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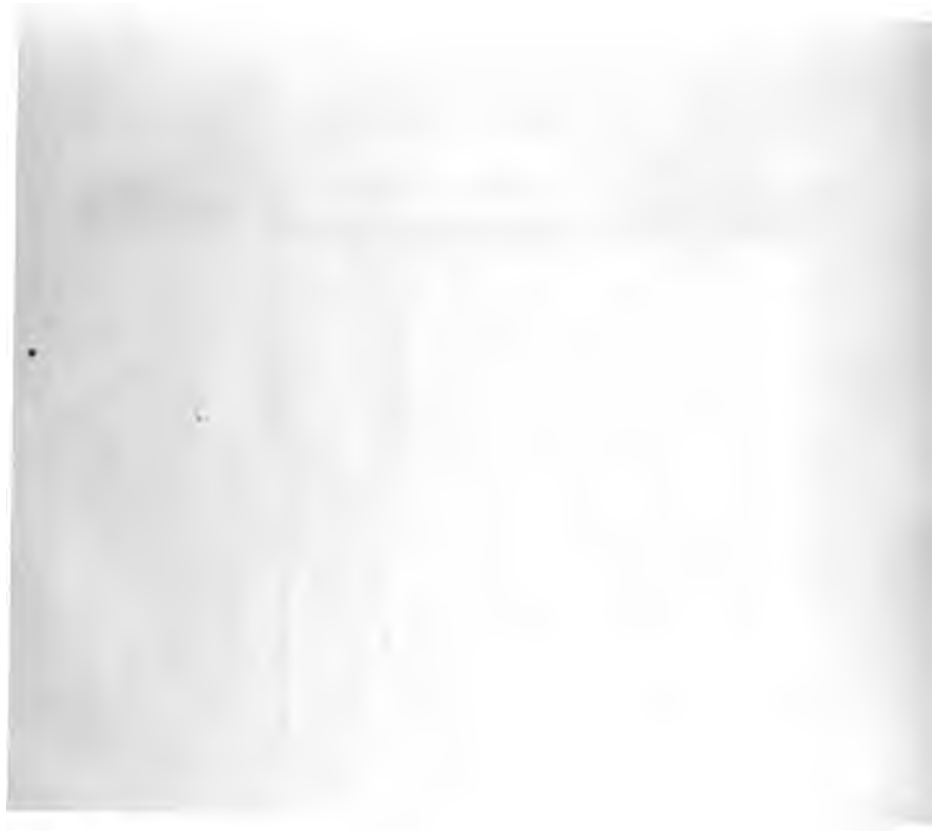

MUNICIPAL CORPORATION CASES

ANNOTATED.

A COLLECTION OF ALL

CASES AFFECTING MUNICIPAL CORPORATIONS
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS JOHNSON MICHIE.

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TABLE OF CASES.

VOLUME III.

Adams *v.* City of Shelbyville (Ind.)..... 575
Adkins *et al. v.* City of Richmond (Va.)..... 514
Afflick *v.* Bates, Treasurer (R. I.)..... 222
Appeal of City of Philadelphia, *In re* Orkney St. *v.* (Pa.)..... 288
Arbuckle-Ryan Co. *v.* City of Grand Ledge (Mich.)..... 205
Arnold *v.* Town of Walton (Ky.)..... 735
Ashbrook, City of Hamilton *v.* (Ohio)..... 750
Attorney General *v.* Pingree *et al.* (Mich.)..... 70
Attorney General *v.* Williams *et al.* (Mass.)..... 358
Baird *et al.*, Parish *v.* (N. Y.)..... 499
Barnett *v.* City of Atlanta (Ga.)..... 373
Barron, Treasurer, Walsh *v.* (Ohio)..... 1
Bates, Treasurer, Afflick *v.* (R. I.)..... 222
Beard, Tillman *v.* (Mich.)..... 246
Bell *v.* Village of Wayne (Mich.)..... 294
Birdseye *et al. v.* Village of Clyde *et al.* (Ohio)..... 13
Braisted, People *v.* (Colo.)..... 747
Brownback *v.* Burgess, etc., of Borough of North Wales (Pa.)... 526
Brown *et al.*, City of St. Louis *v.* (Mo.)..... 659
Buckley *v.* Kansas City *et al.* (Mo.)..... 475
Buffington *et al.*, Davenport *v.* (C. C. A.)..... 224
Burgess, etc., of Borough of North Wales, Brownback *v.* (Pa.)... 526
Carlisle *et al. v.* Wilson *et al.* (Ga.)..... 498
Chicago General St. Ry. Co. *v.* Ellicott *et al.* (Ill.)..... 212
City of Allegheny *et al.*, Rushton *et al. v.* (Pa.)..... 29
City of Ann Arbor, Corey *v.* (Mich.)..... 720
City of Atlanta, Barnett *v.* (Ga.)..... 373
City of Auburn, Hughes *v.* (N. Y.)..... 35
City of Chicago, Gundling *v.* (U. S.)..... 531
City of Chicago *v.* Williams (Ill.)..... 110
City of Dayton *v.* Taylor's Adm'r (Ohio)..... 144
City of Denver *v.* Moewes (Colo.)..... 712
City of Elberton, Long *v.* (Ga.)..... 450
City of Ft. Madison, Saunders *v.* (Iowa)..... 553
City of Grand Ledge, Arbuckle-Ryan Co. *v.* (Mich.)..... 205
City of Guthrie *v.* T. W. Harvey Lumber Co. (Okla.)..... 240
City of Hamilton *v.* Ashbrook (Ohio)..... 750

City of Hartford, Judd *et al. v.* (Conn.) 46
City of Haverhill *et al.*, Wood *et al. v.* (Mass.) 357
City of Henderson, Negley *v.* (Ky.) 539
City of Hinton, Wood *et al. v.* (W. Va.) 547
City of Laporte, Gamewell Fire-Alarm Tel. Co. *v.* (Ind.) 120
City of Laurens *v.* Elmore (S. Car.) 59
City of Lincoln *v.* Pirner (Neb.) 233
City of Louisville *v.* Seibert (Ky.) 118
City of Louisville *v.* Selvage (Ky.) 330
City of Lynchburg, Duncan *v.* (Va.) 540
City of Memphis *et al.*, Iron Mountain R. Co. of Memphis *v.* (C. C. A.) 677
City of Minneapolis, Engstrom *v.* (Minn.) 34
City of New Haven, New Haven Steam Sawmill Co. *v.* (Conn.) . 65
City of New Orleans *v.* Kientz (La.) 341
City of New Orleans, L'Hote and the Church Extension Society of the Methodist Episcopal Church *v.* (U. S.) 561
City of Norfolk *v.* Young *et al.* (Va.) 406
City of Omaha *v.* Croft *et al.* (Neb.) 172
City of Orlando, Mernaugh *v.* (Fla.) 164
City of Philadelphia, Corbin *v.* (Pa.) 484
City of Philadelphia's Appeal, *In re* Melon St. (Pa.) 503
City of Poplar Bluff, Wheeler *v.* (Mo.) 20
City of Richmond, Adkins *et al. v.* (Va.) 514
City of Shelbyville, Adams *v.* (Ind.) 575
City of Springfield, Lynch *v.* (Mass.) 219
City of St. Louis *v.* Brown *et al.* (Mo.) 659
City of St. Paul, Rogers *et al. v.* (Minn.) 186
City of Tacoma, North Springs Water Co. *v.* (Wash.) 410
City of Topeka *v.* Raynor (Kan.) 238
City of Valparaiso *v.* Hagen *et al.* (Ind.) 51
City of Wheeling, Hunderman *v.* (W. Va.) 92
City of Williamsburg, Jones *v.* (Va.) 444
Commissioners of Roads and Revenues of Polk County *v.* Mayor, etc., of Cedartown (Ga.) 723
Commonwealth, Gastenau *v.* (Ky.) 736
Comstock *et al. v.* Incorporated Village of Nelsonville *et al.* (Ohio) 197
Cook, People *ex rel.* Kochersperger *v.* (Ill.) 304
Corbin *v.* City of Philadelphia (Pa.) 484
Corey *v.* City of Ann Arbor (Mich.) 720
Croft *et al.*, City of Omaha *v.* (Neb.) 172
Davenport *v.* Buffington *et al.* (C. C. A.) 224
Dominice, Town of Roswell *v.* (N. Mex.) 8
Duncan *v.* City of Lynchburg (Va.) 540
Edgerton *v.* Goldsboro Water Co. (N. Car.) 439
Ellicott *et al.*, Chicago General St. Ry. Co. *v.* (Ill.) 212

Elmore, City of Laurens *v.* (S. Car.) 59
Engstrom *v.* City of Minneapolis (Minn.) 34
Finnical *v.* Village of Cadiz (Ohio) 194
Fleetwood *v.* Read (Wash.) 336
Gamewell Fire-Alarm Tel. Co. *v.* City of Laporte (Ind.) 120
Gastenau *v.* Commonwealth (Ky.) 736
Gates, Neill *v.* (Mo.) 727
Gleason *et al. v.* Waukesha County *et al.* (Wis.) 385
Goldsboro Water Co., Edgerton *v.* (N. Car.) 439
Gross, Town of St. Lawrence *et al. v.* (S. D.) 510
Gundling *v.* City of Chicago (U. S.) 531
Gurney *v.* Inhabitants of Rockport (Me.) 217
Hagen *et al.*, City of Valparaiso *v.* (Ind.) 51
Harvey, T. W., Lumber Co., City of Guthrie *v.* (Okla.) 240
Henderson, Marshal, *v.* Heyward (Ga.) 739
Heyward, Henderson, Marshal, *v.* (Ga.) 739
Hornung *v.* McCarthy *et al.* (Cal.) 251
Hughes *v.* City of Auburn (N. Y.) 35
Hungerman *v.* City of Wheeling (W. Va.) 92
Incorporated Village of Nelsonville *et al.*, Comstock *et al. v.* (Ohio) 197
Ingersoll *v.* Town of Newton (N. J.) 380
Inhabitants of Andover, Trustees of Phillips Academy *v.* (Mass.) 128
Inhabitants of Rockport, Gurney *v.* (Me.) 217
Inhabitants of Town of Somerset, Purinton *v.* (Mass.) 509
In re Melon St., Appeal of City of Philadelphia (Pa.) 503
In re Orkney St. *v.* Appeal of City of Philadelphia (Pa.) 288
Iron Mountain R. Co. of Memphis *v.* City of Memphis *et al.* (C. C. A.) 677
Jones *v.* City of Williamsburg (Va.) 444
Judd *et al. v.* City of Hartford (Conn.) 46
Kansas City *et al.*, Buckley *v.* (Mo.) 475
Kassell *v.* Mayor, etc., of City of Savannah (Ga.) 148
Kientz, City of New Orleans *v.* (La.) 341
Koger *v.* Mayor, etc., of City of Madison (Ga.) 369
L'Hote and the Church Extension Society of the Methodist Episcopal Church *v.* City of New Orleans (U. S.) 561
Long *v.* City of Elberton (Ga.) 450
Lucas, Selvage *v.* (Ky.) 330
Lynch *v.* City of Springfield (Mass.) 219
McCarthy *et al.*, Hornung *v.* (Cal.) 251
Mayor, etc., of Cedartown, Commissioners of Roads and Revenues of Polk County *v.* (Ga.) 723
Mayor, etc., of City of Chattanooga *v.* Reid (Tenn.) 308
Mayor, etc., of City of Madison, Koger *v.* (Ga.) 369
Mayor, etc., of City of Savannah, Kassell *v.* (Ga.) 148

Mayor, etc., of North Plainfield, State (Coward *et al.*, Prosecutors) *v.* (N. J.) 326
Mernaugh *v.* City of Orlando (Fla.) 164
Moewes, City of Denver *v.* (Colo.) 712
Monroe Waterworks & Light Co. *et al.*, Planters' Oil Mill *v.* (La.) 459
Mosher *et al.*, Board of Com'rs, People *ex rel.* Balcom *v.* (N. Y.) 762
Negley *v.* City of Henderson (Ky.) 539
Neill *v.* Gates (Mo.) 727
New Haven Steam Sawmill Co. *v.* City of New Haven (Conn.) 65
North Springs Water Co. *v.* City of Tacoma (Wash.) 410
Orr, State *ex rel.* Attorney General *v.* (Ohio) 196
Overman, Clerk, *et al.*, Schroder *v.* (Ohio) 314
Parish *v.* Baird *et al.* (N. Y.) 499
People *ex rel.* Balcom *v.* Mosher *et al.*, Board of Com'rs (N. Y.) 762
People *v.* Braisted (Colo.) 747
People *ex rel.* Kochersperger *v.* Cook (Ill.) 304
Pingree *et al.*, Attorney General *v.* (Mich.) 70
Pirner, City of Lincoln *v.* (Neb.) 233
Planters' Oil Mill *v.* Monroe Waterworks & Light Co. *et al.* (La.) 459
Purinton *v.* Inhabitants of Town of Somerset (Mass.) 509
Raynor, City of Topeka *v.* (Kan.) 238
Read, Fleetwood *v.* (Wash.) 336
Reid, Mayor, etc., of City of Chattanooga *v.* (Tenn.) 308
Rogers *et al. v.* City of St. Paul (Minn.) 186
Rushton *et al. v.* City of Alleghany *et al.* (Pa.) 29
Saunders *v.* City of Ft. Madison (Iowa) 553
Schroder *v.* Overman, Clerk, *et al.* (Ohio) 314
Seibert, City of Louisville *v.* (Ky.) 118
Selvage, City of Louisville *v.* (Ky.) 330
Selvage *v.* Lucas (Ky.) 330
Sparks Mfg. Co. *v.* Town of Newton (N. J.) 380
State (Coward *et al.*, Prosecutors) *v.* Mayor, etc., of North Plainfield (N. J.) 326
State *ex rel.* Attorney General *v.* Orr (Ohio) 196
Tarbutton *v.* Town of Tennille (Ga.) 140
Taylor's Adm'r, City of Dayton *v.* (Ohio) 144
Tillman *v.* Beard (Mich.) 246
Town of Crowley *v.* West (La.) 153
Town of Newton, Ingersoll *v.* (N. J.) 380
Town of Newton, Sparks Mfg. *v.* (N. J.) 380
Town of Johnson City *v.* Wolfe *et al.* (Tenn.) 349
Trustees of Phillips Academy *v.* Inhabitants of Andover (Mass.) 128
Town of Roswell *v.* Dominice (N. Mex.) 8
Town of St. Lawrence *et al. v.* Gross (S. D.) 510
Town of Tennille, Tarbutton *v.* (Ga.) 140

Town of Walton, Arnold *v.* (Ky.) 735
Village of Cadiz, Finnical *v.* (Ohio) 194
Village of Clyde *et al.*, Birdseye *et al. v.* (Ohio) 13
Village of Wayne, Bell *v.* (Mich.) 294
Walsh *v.* Barron, Treasurer, (Ohio) 1
Waukesha County *et al.*, Gleason *et al. v.* (Wis.) 385
West, Town of Crowley *v.* (La.) 153
Wheeler *v.* City of Poplar Bluff (Mo.) 20
Williams *et al.*, Attorney General *v.* (Mass.) 358
Williams, City of Chicago *v.* (Ill.) 110
Wilson *et al.*, Carlisle *et al. v.* (Ga.) 498
Wolfe *et al.*, Town of Johnson City *v.* (Tenn.) 349
Wood *et al. v.* City of Haverhill *et al.* (Mass.) 357
Wood *et al. v.* City of Hinton (W. Va.) 547
Young *et al.*, City of Norfolk *v.* (Va.) 406

MUNICIPAL CORPORATION CASES.

VOLUME III.

WALSH

v.

BARRON, TREASURER.

(*Supreme Court of Ohio, Oct. 24, 1899.*)

Local Assessments Must Not Exceed Special Benefits.*—The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is that the property is specially benefited by the improvement beyond the benefits common to the public, and that a ratable assessment of the property to the extent of these benefits violates no constitutional right of the owner, and is just and proper. But it can in no case exceed the benefits, without impairing the inviolability of private property.

Same—Effect of Statute.— The amendment to the Taylor law by which the provision of section 2270, Rev. St., limiting assessments to 25 per cent. of the value of the property as returned for taxation, is made not to apply to improvements under that law, cannot be construed to confer an unlimited power of assessment on the municipality in proceedings under the law. The power is still subject to the general principle which underlies all assessments for local improvements ; and, when an assessment is made in substantial excess of the benefits, it must be set aside and held for naught, subject, however, to the right of the city to have a new assessment made on accurate principles.

(Syllabus by the Court.)

ERROR by defendant to Franklin county circuit court. *Reversed.*

The action below was commenced by the treasurer of Franklin county for the collection of certain taxes and

*See Figg *v.* Thompson *et al.*, 1 Mun. Corp. Cas. 603, and *note*, 607.

Case Stated.

assessments that had been levied and made upon certain property of the defendant, John Walsh, which had not been paid. Walsh filed an answer and cross petition, to which a demurrer was sustained, and the case was then appealed by him to the circuit court after judgment on the demurrer. In this court the demurrer to the answer and cross petition was also sustained, and judgment rendered for the treasurer. The question in this case arises upon the sufficiency of this pleading, which reads as follows: "The defendant, John Walsh, for answer and cross petition herein, says that the city of Columbus, a municipal corporation under the laws of Ohio, being a city of the first grade, second class, and Samuel R. Stone are necessary parties to the complete determination of the question involved in this action. Said defendant, John Walsh, is the owner in fee simple of lots Nos. 1 to 10, inclusive, of John Walsh's subdivision of lot No. 25 in Solomon and George W. Beers' subdivision of about 40 acres in quarter township 3, town 1, range 18, U. S. military lands, as shown on the plat of record in Plat Book 5, at page 96, in the recorder's office of Franklin county, Ohio, being the first ten parcels described in the petition herein; and he has a valid defense to plaintiff's action as to those lots, as hereinafter set forth. The said lots, numbered from 1 to 9, inclusive, are located on the south side of Dodridge street, in said city of Columbus, and each lot abounds and abuts on said street 33 feet. On September 15, 1890, the council of said city of Columbus adopted a resolution that it was necessary to improve Dodridge street from High street to the west corporation line, by grading and constructing thereon an asphalt, stone block, Hayden block, fire clay or hard-burned brick pavement, and setting a five-inch curb of Berea and Fulton stone, and that said improvement be made under and according to an act of the general assembly of the state of Ohio passed May 11, 1886, entitled 'An act to provide for the improvement of streets, avenues and alleys in cities of the first grade of the second class,' commonly called the

'Taylor Law.' Said resolution was published in the mode provided by law. On November 17, 1890, said city council passed an ordinance to provide for making said improvement of said street in the manner stated in said resolution, and for the issue of bonds to cover the cost and expense, and said cost and expense, to be assessed, as provided in said act of the general assembly, equally by the front foot on the property fronting or abutting on said improvement. Thereafter said city, by its officers, contractors, and employees, did improve said street by grading and constructing thereon a Hayden block pavement, and setting a five-inch curb, and after the completion of said work, on February 27, 1893, the council of said city passed an ordinance assessing the sum of five dollars and thirty-four cents and 3 and 1-10 mills upon each foot front of the several lots of land bounding or abutting upon said street, and requiring that the same should be paid at the office of the treasurer of said Franklin county, Ohio, in fourteen equal annual installments, with interest thereon, at 6 per cent. per annum, payable semiannually, and that the clerk certify said assessment to the treasurer for collection. By said ordinance the assessment on each of this defendant's said lots numbered 1 to 9, inclusive, is the sum of $176.32. In addition to said assessment, said city at the same time assessed upon each of said lots numbered 5 to 10, inclusive, the sum of $30 for a sewer constructed in subdistrict I in main sewer district No. 2. The several sums demanded in the petition as taxes and assessments on said lots are made up as follows: (1) The sum of $7.44 on each lot as ordinary taxes for 1896, and the penalty for nonpayment thereof; (2) the sum of $3.24 on each lot for ordinary taxes in 1897; (3) the sum of $50.36 on each lot for four installments of said street assessment; (4) the sum of $39.30 on each lot for interest to December 20, 1897, on said street assessment; (5) the sum of $30 on each of said lots numbered from 5 to 10, inclusive, for said sewer assessment. Said assessments are illegal and invalid for the reason that they exceed the value of said lots, and said

respective lots could not have been sold at any time since or before said street improvement was ordered for the amount assessed upon them, respectively, on account thereof, and cannot now be sold for the amount thereof, and they have been offered at tax sales by the treasurer, and not sold, because no one would pay the amount of taxes and of said assessments now due thereon for the same, and at the last sale of delinquent lands said lots were forfeited to the state of Ohio; and, if said lots are now sold by order of the court in this case, they will not bring the amount of taxes and assessments thereon, and this defendant will be deprived of his property, for public uses, without receiving any consideration therefor. This defendant did not petition for, promote, or participate in the making of said improvements, or either of them. This defendant has offered to pay the ordinary taxes on said lots, and has paid on said street assessment an amount far in excess of what would be due had the same been limited to 25 per cent. of the value of said property; and said treasurer has always and does still refuse to receive ordinary taxes on said lots, unless this defendant will at the same time pay the said assessments. The said act of the general assembly under which said street was improved, and the act passed March 21, 1887 (84 Ohio Laws, p. 176), providing that section 2270, Rev. St., shall not apply to improvements made under said act of May 11, 1886, are each unconstitutional in their operation and effect, as applied to this defendant's land and the improvement in question, because they operate to effect the confiscation of defendant's property to pay for a public improvement as aforesaid, and violate article 1, § 19, of the constitution of Ohio. The defendant is without adequate remedy at law, and will be irreparably injured and will lose his property unless the court, in the exercise of its equity jurisdiction, grants him relief. Wherefore said defendant prays that said assessments may be adjudged to be invalid and void, and defendant's said premises adjudged to be free from the lien thereof, and plaintiff's petition be dismissed, and for all

other proper relief." Stone was made a party, and answered. His pleading is substantially the same, as to the lots in which he is interested, as that of Walsh, and need not be further noticed.

C. T. Clark, for plaintiff in error.

Dyer & Williams and *Crum, Irvine & Pretzman*, for defendants in error.

MINSHALL, J. (after stating the facts). The question in this case relates to the validity of an assessment made upon property for the cost of an improvement. From the averments of his answer and cross petition, it appears that the assessment made upon each lot of Walsh is in excess of its entire value; that each lot would not before or since the improvement have sold for enough to pay the assessment upon it; that they have in fact been offered and returned not sold, and forfeited to the state. He in no way promoted the proceeding, and is not, therefore, precluded from making the question as to the validity of the assessment. Upon the admitted averments of the pleading, the naked question here presented is whether an assessment may be made upon the property of an owner for the cost of a public improvement that is not only in excess of the benefits conferred on it, but of its value with the benefits added by the improvement. We do not think this can be done, where the party complaining in no way promoted the improvement. By no refinement of reasoning can it be construed to be anything else than the taking of private property for public use without compensation. According to the best considered of the modern cases, and the most reliable authorities, an assessment, being sustainable only on the theory of special benefits conferred on the land by the improvement over those received by the general public, is necessarily limited to the value of the benefits so conferred. The value of the entire benefits so conferred may be assessed upon the land for the cost of the improvement. More, however, cannot be exacted, without impairing

Local Assessments Must Not Exceed Special Benefits.

the inviolability of private property guarantied by the constitution, or, in other, if not more appropriate, words, confiscating it. In a recent case decided by the supreme court of the United States (Village of Norwood *v.* Baker, 172 U. S. 269, 279, 19 Sup. Ct. 187, 191), it said in the opinion: "The exaction from the owner of private property of the cost of a public improvement in substantial excess of the benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over specific benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." JUDGE DILLON, after referring to the earlier cases, which generally concede to the legislature the power to determine what property is benefited, and the extent to which it might be assessed, and hold that the courts have no control over the discretion of the legislature in this regard, says: "But since the period when express provisions have been made in many of the state constitutions, requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that special benefits actually received by each parcel of contributing property was the only principle on which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must on principle be regarded as the just and reasonable doctrine,—that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially benefited, and, since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury." The cases are cited in the note of the learned author. See, also, Cooley, Tax'n (2d Ed.) 661; Chamberlain *v.* City of Cleveland, 34 Ohio St. 557. No one of the states has, by its constitution, more

carefully guarded the powers of taxation and assessment than Ohio. Indeed, there is in our constitution a special mandate to the legislature to restrict these powers as conferred on municipalities so as to prevent their abuse. Article 13, § 6.

The improvement in this case was made under what is known as the "Taylor Law," applicable only to cities of the grade of the class to which Columbus belongs. There existed at the time a general provision (section 2270, Rev. St.) which limited assessments made by cities of the grade of Columbus to 25 per cent. of the value of the property as returned for taxation. By an amendment made shortly after the adoption of the Taylor law, it was enacted that this section limiting assessments should not apply to improvements made under that law. The law, with the amendment, was held valid in Parsons *v.* City of Columbus, 50 Ohio St. 460, 34 N. E. 677. Had the application of section 2270 to the Taylor law not been removed, the question presented in this case could hardly have arisen, or would have been of such a shadowy character as to be beyond judicial cognizance. Whether it was wise in the legislature to have removed the application of this section to the Taylor law, is no part of our duty to consider. We will not, however, presume that the legislature intended to adopt an invalid law, and will give it such a construction as will support it, if that can reasonably be done consistently with its provisions. It is fair to presume that, in removing the limitation of this section, it was not the intention of the legislature to permit the city to disregard the fundamental principle which limits an assessment for benefits to the exent of the benefits conferred by the improvement on the land. There is no provision of the law which would indicate this. It must therefore be held that all assessments under this law must be limited to the benefits conferred, or it must follow that the legislature designed a palpable invasion of the rights of private property, which is not admissible. In other words, in authorizing an assessment to pay for improvements under the law, the legislature had special reference to such assess-

Same—Effect of Statute.

ments as would be no more than the proper proportion of the costs based on the benefits received. The judgment must be reversed, and the cause remanded for further proceeding. And here it is proper to say that, if the facts stated in the pleading of Walsh are found to be true, the city is entitled to have a sum assessed upon each lot substantially equivalent to the special benefits conferred on it by the improvement, unless such sum has already been paid. In ascertaining this sum, the special benefits conferred on each lot, as distinguished from those common to the public, are alone to be considered. Judgment reversed.

TOWN OF ROSWELL

v.

DOMINICE.

(*Supreme Court of New Mexico, Aug. 29, 1899.*)

Local Assessments—Petition.*—A petition by the owners of at least one-half of the property fronting upon a street in a municipal corporation is a jurisdictional prerequisite to the validity of a special assessment upon such abutting property for street grading and improvement.

(Syllabus by the Court.)

APPEAL by plaintiff from Chavez county district court. *Affirmed.*

G. A. Richardson, for appellant.

John Franklin, for appellee.

PARKER, J. This is an action brought by the town of Roswell against the appellee to collect a special tax levied by said town against the property of appellee as his share towards the expense of improving and grading certain streets in said town. The district court dismissed the complaint

*See notes at end of case.

for the reason, among other things, that the tax assessed was without the petition of the owners of at least one-half of the property fronting on such improvement. Appellant assigns for error, among other things, this action of the court below. The town of Roswell is incorporated under the general incorporation laws for towns and villages. Subsection 82 of section 2402 of the Compiled Laws of 1897, applicable to all municipal corporations, provides: "That the levying of assessments provided for by the two preceding sections [street improvements] shall be under a general ordinance prescribing the manner thereof and upon petition of owners of at least one-half of the property frontage of the block fronting on the improvement to be made, and be subject to the provisions of section two thousand four hundred and fifteen." Section 2415, Comp. Laws 1897, provides: "No street or highway shall be opened, straightened or widened, nor shall any other improvement be made which will require proceedings to condemn private property without the concurrence in the ordinance or resolution directing the same of two-thirds of the whole number of the members elected to the council or board of trustees, and the concurrence of a like majority shall be required to direct any improvement or repair of a street or highway, the cost of which is to be assessed upon the owners, unless two-thirds of the owners to be charged therefor shall petition in writing for the same." In this case the board of trustees of the town of Roswell passed the ordinance levying the tax in question by a two-thirds vote, and counsel for appellant contend that section 2415 dispenses with any petition from the owners under such circumstances, but we do not so understand these statutes. Subsection 82 of section 2402, above quoted, after requiring a petition of at least one-half of the abutting owners, also further requires, in accordance with section 2415, a concurrence of two-thirds of the whole number of members elected to the council or board of trustees, unless two-thirds of the abutting owners petition for the improvement, in which latter case a fair majority of the coun-

cil or board of trustees, we understand, might legally pass the ordinance. It appears from the record that no petition of the owners of any portion of the abutting property was made to the board of trustees of the town of Roswell for the improvement made by it, as required by the statute; and it simply remains to be determined what effect the same has upon the tax levy. "Municipalities having no inherent power in these cases [special assessments], it is necessary, to the validity of their action, that they keep closely to the authority conferred. Their ordinances and resolutions must be adopted in due form of law, and they must keep within them afterwards. They can bind taxpayers only in the mode prescribed, and can substitute no other. Their legislative action, if properly taken, is conclusive of the propriety of the proposed improvement, and of the benefits that will result, if it covers the subject; but it will not conclude, as to the preliminary conditions to any action at all,—such, for example, as that there shall be in fact such street as they undertake to provide for the improvement of, or that the particular improvement shall be petitioned for or assented to by a majority or some other defined proportion of the parties concerned. This latter provision is justly regarded as of very great importance, and a failure to observe it will be fatal at any stage of the proceedings." Cooley, Tax'n (2d Ed.) p. 656. This principle seems to be universally recognized. 2 Dill. Mun. Corp. (4th Ed.) § 800; 24 Am. & Eng. Enc. Law, 54; Holland *v.* Mayor, etc., 11 Md. 186; Mulligan *v.* Smith, 59 Cal. 206; Zeigler *v.* Hopkins, 117 U. S. 683, 6 Sup. Ct. 919; Keese *v.* City of Denver, 10 Colo. 112, 15 Pac. 825; Miller *v.* City of Amsterdam (N. Y. App.) 43 N. E. 632. It is to be further noted that no question of estoppel arises in this case, appellee being a nonresident, and no notice having come to him until he was requested to pay the tax, after the improvement had been completed. It follows that, for want of the petition of abutting property owners, the assessment was void as to all such owners, at least, as have not voluntarily paid the

Notes

assessment. In view of the foregoing conclusions, it becomes unnecessary to examine the other interesting and important questions raised by the remaining assignments of error, and discussed in briefs of counsel. The judgment of the lower court will be affirmed, with costs, and it is so ordered.

MILLS, C. J., and MCFIE and CRUMPACKER, JJ., concur. LELAND, J., did not participate in this opinion.

NOTES.

Petition as Prerequisite to Valid Assessment.—When by law the power of a municipality to make an assessment for local purposes is restricted to those cases in which a petition for the improvement is presented by a certain number of property-holders, a strict compliance with the requirements of the law as to the petition is essential to validate the assessment.

United States.—Ogden City *v.* Armstrong, 168 U. S. 224, 18 Sup. Ct. 98; Zeigler *v.* Hopkins, 117 U. S. 683.

Alabama.—Miller *v.* Mobile, 47 Ala. 163, 11 Am. Rep. 768.

Arkansas.—James *v.* Pine Bluff, 49 Ark. 199.

California.—Mulligan *v.* Smith, 59 Cal. 206; Gately *v.* Livingston, 63 Cal. 365; Dyer *v.* Miller, 58 Cal. 585; Dyer *v.* North, 44 Cal. 157; Kahn *v.* San Francisco, 79 Cal. 388; Dougherty *v.* Harrison, 54 Cal. 428; Burnett *v.* Sacramento, 12 Cal. 76; Turrill *v.* Grattan, 52 Cal. 97.

Illinois.—Updike *v.* Wright, 81 Ill. 49; Board of Directors *v.* Houston, 71 Ill. 318.

Cities of less than 25,000 population do not come within the scope of section 7 of the Illinois act of June 14, 1897, empowering the board of local improvements to originate a scheme for any such improvement, either with or without a petition. Bloomington *v.* Reeves, 177 Ill. 161, 52 N. E. 278; Whaples *v.* Wankegan, 179 Ill. 310, 53 N. E. 618.

Indiana.—Kyle *v.* Malin, 8 Ind. 34; Forsyth *v.* Kreuter, 100 Ind. 27; Ely *v.* Morgan Co. Comm'rs, 112 Ind. 361; Mowbery *v.* Jeffersonville, 38 Ind. 198; Delphi *v.* Evans, 36 Ind. 90; Case *v.* Johnson, 91 Ind. 477.

The statutes of Indiana do not make a petition an indispensable requisite to a paving improvement authorized by a two-thirds vote of the town's trustees. Pittsburg, etc., R. Co. *v.* Crownpoint, 150 Ind. 536, 50 N. E. 741.

Notes

Sidewalk improvement may be made by summary method, under Rev. St. Ind., 1894, § 4394. Keith *v.* Wilson, 145 Ind. 149, 44 N. E. 13.

Iowa.—Richman *v.* Muscatine Co., Sup., 70 Iowa 627; Hager *v.* Burlington, 42 Iowa 661.

Kansas.—Steinmuller *v.* Kansas City (Kan. App.), 44 Pac. Rep. 600; Welsford *v.* Weidlein, 23 Kans. 601; Shaffer *v.* Meech, 34 Kan. 595; Sleeper *v.* Bullen, 6 Kan. 300.

Under Gen. St. Kan., 1889, par. 832, no petition is necessary in a city of the second class to give the council jurisdiction over sidewalks for the purpose of repairs or reconstruction. Wilkin *v.* Houston (Kan.), 30 Pac. Rep. 23.

Kentucky.—Howard *v.* Bristol, 8 Bush (Ky.), 493; Covington *v.* Casey, 3 Bush, 698; Lexington *v.* Headley, 5 Bush, 508; Louisville *v.* Hyatt, 2 B. Mon. 177.

Louisiana.—*In re* Royal Street, 16 La. Ann. 393; McGuinn *v.* Peri, 16 La. Ann. 326; McKee *v.* Brown, 23 La. Ann. 306; Daniel *v.* New Orleans, 26 La. Ann. 1.

Maryland.—Henderson *v.* Baltimore, 8 Md. 352; Holland *v.* Baltimore, 11 Md. 186; Howard *v.* First Presbyterian Church, 18 Md. 451; Dashiell *v.* Baltimore, 45 Md. 615; Stewart *v.* Baltimore, 7 Md. 500; Baltimore *v.* Eschbach, 18 Md. 276; Bouldin *v.* Baltimore, 15 Md. 18.

Massachusetts.—Henry *v.* Thomas, 119 Mass. 583.

Missouri.—Jefferson Co. *v.* Cowan, 54 Mo. 234; Zimmerman *v.* Snowden, 88 Mo. 218; St. Louis *v.* Clemens, 36 Mo. 467.

Nebraska.—State *v.* Birkhauser (Neb. 1893), 56 N. W. Rep. 303; Leavitt *v.* Bell, 55 Neb. 57, 75 N. W. 524; Von Steen *v.* City of Beatrice (Neb.), 54 N. W. 677.

Under Consol. St. Neb., 1891, § 2373, the mayor and city council of a metropolitan city have no jurisdiction to create paving districts without a petition of the property owners being presented to the council, where the entire improvement is to be made at the expense of the lot owners, nor can they order the paving of a street in such district, where created, except by the petition of such owners. State *v.* Birkhauser, 37 Neb. 521, 56 N. W. 303.

New Jersey.—Camden *v.* Mulford, 2 Dutch (N. J.) 49; State *v.* Elizabeth, 30 N. J. L. 176; State *v.* Newark, 37 N. J. L. 415; State *v.* Orange, 32 N. J. L. 49; Carron *v.* Martin, 26 N. J. L. 594; State *v.* Elizabeth, 31 N. J. L. 176; State *v.* Hand, 31 N. J. L. 547; State *v.* Stockton, 61 N. J. L. 520, 39 Atl. 921.

New York.—Boyle *v.* Brooklyn, 71 N. Y. 1; People *v.* Brooklyn, 71 N. Y. 495; *In re* Kiernan, 62 N. Y. 457; People *v.* Rochester, 21 Barb 656; Miller *v.* City of Amsterdam, 28 N. Y. Supp. 1021; *In re* Sharp, 56 N. Y. 257, 15 Am. Rep. 415; Litchfield *v.* Vernon, 41 N. Y. 129; Sharp *v.* Speir, 4 Hill (N. Y.) 76.

Ohio.—Tone's Ex'rs *v.* Columbus, 3 Am. & Eng. Corp. Cas. 644; Wamelink *v.* City of Cleveland, 3 Am. & Eng. Corp. Cas. 638.

Oregon.—Smith *v.* Minto, 30 Ore. 351, 48 Pac. 166.

Pennsylvania.—Pittsburgh *v.* Walter, 69 Pa. St. 365.

Texas.—Jennings *v.* Most, 4 Tex. 452.

Wisconsin.—Fass *v.* Seehawer, 60 Wis. 525; Wells *v.* Burnham, 20 Wis. 112; State *v.* Nelson, 57 Wis. 147.

BIRDSEYE *et al.*

v.

VILLAGE OF CLYDE *et al.*

(*Supreme Court of Ohio, Oct. 24, 1899.*)

Local Assessments—Municipal Authority—Construction of Statutes.—It is the general policy of our legislation to restrain the power of local assessment by fixing a limit on the amount that may be levied, beyond which municipal corporations may not go; and, unless the contrary clearly appears, an intention to adhere to that policy in the enactment of particular statutes relating to local assessments will be presumed, and a construction given to them, if possible, allowing the application of the general limitations.

Same—Same—Same—Right to Enjoin Excess.—The provision of section 2270, Rev. St., which forbids the levy by incorporated villages of any assessment on any lot or land for any improvement in excess of 25 per cent. of the value of the property as assessed for taxation, is applicable to assessments for improvements made under the act of February 1, 1893 (90 Ohio Laws, p. 434); and the excess of any such assessment may be enjoined at the suit of the owner of the property upon which it is laid.

Same—Action to Enjoin Excess—Estoppel.*—The owner is not estopped to maintain such an action by having acquiesced in the construction of the improvement, nor by petitioning therefor, and thereby consenting to the raising of a certain proportion of its cost by assessment on all abutting property. By such acts he binds his property for the payment of its proper share of a legal assessment for the cost of the improvement, but no further.

(Syllabus by the Court.)

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*See notes at end of case.

Birdseye *v.* Village of Clyde

ERROR by plaintiffs to Sandusky county circuit court. *Reversed.*

Richards, Heffner & Parkhurst and *M. W. Hunt*, for plaintiffs in error.

J. C. Craig, J. D. Finch, and *Homer Metzgar*, for defendants in error.

WILLIAMS, J. The council of the village of Clyde on the 8th day of March, 1893, adopted a resolution declaring that it was necessary to improve, by sewering, grading, curbing, and paving with brick, a designated portion of Main street, in that village, and that one-third of the cost should be paid by general tax, and the remainder assessed, according to the foot frontage, against the lots and lands abutting on that part of the street to be so improved. Prior to the adoption of the resolution a majority of the owners of the property which abutted on the proposed improvement signed and presented to the council the following petition: "To the Village Council: The undersigned, a majority of the owners of the property abutting on Main street, between Elm street and the Western Reserve and Maumee turnpike, do hereby petition your body for the improvement of said street between said points, and request the passage of the necessary ordinance, assessing the cost thereof as follows: One-third to be assessed upon the general tax list, and two-thirds upon the abutting property in proportion to the feet front; to which assessment we do hereby agree. The improvement desired consists of sewering and constructing the necessary culverts or drains, grading, paving, and setting curb and gutter stones." After making due publication of the resolution, the council proceeded to pass the necessary ordinance, and to let the contract, for the construction of the improvement, and, after its completion, assessed two-thirds of its cost upon the abutting property, according to the foot frontage, and ordered the assessment to be certified to the county auditor for levy. The assessment so made, on each of a number of the abutting lots, exceeds

Case Stated.

25 per cent. of their valuation on the duplicate for taxation, and in several instances is in excess of the entire taxable valuation of the lot. The owners of some of these lots brought the action below to enjoin the excess of the assessment over 25 per cent. of the taxable valuation of their lots, and obtained a decree in the common pleas court to that effect; but in the circuit court, where the cause was tried on appeal, the judgment was against the plaintiffs, who are seeking its reversal here.

Authority for making the assessment in excess of 25 per centum of the taxable valuation of the abutting lots is claimed under the act of February 1, 1893 (90 Ohio Laws, p. 434), by which any village having at the last federal census a population between 2,320 and 2,350 is authorized to improve its streets and construct sewers. The proceedings here involved were had under that act, which is applicable to the village of Clyde, and probably to that village only; and the contention is that, as the act makes particular provision for such proceedings by the particular class of corporations to which it applies, its effect is to exclude any limitation imposed by general statute with respect to the amount of the assessment that may be laid on abutting property, and itself attaches no limitation, except that it shall not exceed two-thirds of the cost of the improvement. Whether such is the operation of the act, which appears to have been the view taken of it by the circuit court, becomes an important inquiry in the case. It purports to confer on villages of the designated class power to borrow money for the purpose of improving and paving their streets and constructing sewers therein, and provides that "two-thirds of the cost for improving and paving any street and constructing a sewer under such paved part, for which said street improvement fund shall be used, shall be assessed on the real estate bounding and abutting thereon, and according to the foot frontage of the real estate so bounding and abutting as provided by the laws of the state of Ohio." It is not doubted that, by the

last clause above quoted, some of the provisions of the general statutes of the state relating to assessments by villages for local improvements are by that reference incorporated into, and become part of, the special act, and were intended to operate upon and govern assessments under the act. It is urged, however, that the reference is only to those provisions which prescribe the manner of making assessments by the front foot. But there seems to be no particular manner prescribed by the General Statutes for making assessments by that method beyond what the words "by the foot front" fairly import, which is that the assessment is to be apportioned according to the number of the feet front subject to the assessment, and that manner is as certainly described in the same language in the special act; so that any reference to the General Statutes for that purpose was not only unnecessary, but without any significance. The reference, we think, is rather to those general provisions of the laws of the state relating to local assessments in regard to which the special act is silent; including, no doubt, those providing for the adoption of the necessary resolution, and the improvement and assessing ordinances, though these steps belong to the mode of procedure for the accomplishment of the improvment, and are required to be taken, whatever method of assessment may be resorted to for the payment of the improvement. But, while the general provisions alluded to are included in the reference in the special act, it by no means follows that others are not, also. The language is broad enough to comprehend all general statutory regulations governing the making of assessments by incorporated villages on abutting property. Among such general regulations in force when the special act was passed, and when the proceedings in question were had under it, is that contained in section 2270 of the Revised Statutes, which forbids the levy by municipal corporations, of the class to which the village of Clyde belongs, of any tax or assessment upon any lot or land for any improvement, in excess of 25 per cent. so

of the value of the property as assessed for taxation. From this and other similar statutory provisions, it appears to be a general policy of our legislation to restrain the power of local assessment, by fixing a limit on the amount that may be levied, beyond which municipal corporations may not go. The policy is a salutary one, established for the purpose of affording protection against unreasonable public burdens, and it is not to be presumed that, in the enactment of subsequent legislation on the subject of assessments, there was any intention to abandon it. Naturally, the presumption would be that the intention was to adhere to the policy, unless the contrary be clearly shone. In giving construction to this special act, it should therefore, if possible, be brought into harmony with section 2270 of the Revised Statutes, and effect be given to the provisions of both. This, we think, may be done. If it had been intended by the former to authorize assessments to be laid on abutting lots, without limit upon the amount, the latter easily could, and no doubt would, have been excepted from the provisions of the general laws of the state expressly made applicable to assessments under the special act. This was not done, and there appears to be no controlling necessity requiring the interpolation of the exception by construction, nor such irreconcilable conflict between the two statutes that both may not operate together. While the special act fixes the proportion of the improvement fund that may be raised by assessment, it is silent as to the amount that may be laid on the specific lots and lands which abut on the improvement; and in that respect the assessment is governed by section 2270, and subject to the limitation it imposes. The rules of interpretation in such cases, and some of the reasons therefor, are set forth in the opinion in City of Cincinnati *v.* Connor, 55 Ohio St. 82, 44 N. E. 582, and need not be repeated here. Much of what is there said is applicable here.

Local Assessments—Municipal Authority—Construction of Statutes.

Same—Same—Same—Right to Enjoin Excess.

The further claim is made, in support of the judgment below,

that the plaintiffs are estopped from contesting the assessments against their property, because, with knowledge that the improvement was under construction, they suffered it to proceed to completion without objection, or, if all of the plaintiffs not so estopped, those of them are estopped who signed the petition that was presented to the council, requesting the improvement to be made. The record shows that all of the plaintiffs knew of the progress of the improvement, and made no objection to its construction, or to any of the proceedings under which it was constructed. This acquiescence on their part would be sufficient to estop them from attacking the validity of those proceedings. But they had no knowledge of the amount of the assessment charged against their lots, and could have none, until the assessing ordinance was passed, and they promptly interposed with their injunction as soon as they learned the assessment exceeded 25 per cent. of the taxable valuation of their lots. Silence, or assent to the making of the improvement, could not operate as an estoppel to challenge the correctness of the assessment; for, until the plaintiffs had knowledge of the assessment, it was their right to assume that it would be made in conformity with the law, and not in violation of the positive prohibitive provisions of the statute. To hold otherwise would require them not only to take notice, at their peril, of the illegal action of the public authorities, but to anticipate that in their official action they would disregard their legal duties. Their silence or acquiescence bound them no further than to submission to a proper assessment against their property, legally imposed. And it can hardly be supposed that the plaintiffs, who signed the petition for the improvement, intended thereby to donate their entire property to the public, or, what is practically the same thing, consent to an assessment that would amount to its confiscation. They evidently contemplated that some special benefit would accrue to them from the construction of the improvement, which could not possibly be the case if the substantial value of their property were taken to pay the assessment laid upon it. The petition

Same—Action to Enjoin Excess—Estoppel.

Notes

must be construed in the light of this situation, and so as to effectuate the manifest intention of the parties.

Some other questions are argued in the case, but they do not seem to be material. We express no opinion upon the constitutionality of the special act, for that is unnecessary to the decision of the case. The plaintiffs consent that the assessments made against their respective lots shall stand to an amount equal to one-quarter of their taxable valuation, and they are entitled to an injunction restraining the collection of the excess. Such judgment may be entered here, in connection with the reversal of the judgment below. Judgment accordingly.

NOTES.

Local Assessments—Right to Enjoin.—A municipal corporation may be enjoined from enforcing an illegal local assessment, where a full and complete remedy is not furnished at law to the property owner, or where such relief will prevent a multiplicity of suits or where the invalidity of the assessment must be established by proof *dehors* the record. Wilson *v.* Lambert, 168 U. S. 611, 18 Sup. Ct. Rep. 217, 26 Wash. L. Rep. 106; Craighill *v.* Van Riswick, 8 App. D. C. 185, 24 Wash. L. Rep. 177; Chase *v.* City Treasurer (Cal.), 55 Pac. Rep. 414; Atlanta *v.* Hamlein, 96 Ga. 381, 23 S. E. Rep. 408; Alley *v.* Lebanon, 146 Ind. 125, 44 N. E. Rep. 1003; Rusk *v.* Berlin, 173 Ill. 634, 50 N. E. Rep. 1071; Harmon *v.* Omaha, 53 Neb. 64, 73 N. W. Rep. 671; Ives *v.* Omaha, 51 Neb. 136, 70 N. W. Rep. 961; Lockwood *v.* St. Louis, 24 Mo. 20; Guest *v.* Brooklyn, 69 N. Y. 506; Beaumont *v.* Wilkes-Barre, 142 Pa. St. 198; Providence Retreat *v.* Buffalo, 51 N. Y. Supp. 654; J. & A. McKechnie Brew Co. *v.* Canandaigna, 15 App. Div. 139, 44 N. Y. Supp. 317; Landon *v.* Syracuse-19 App. Div. 41, 46 N. Y. Supp. 1053; Knell *v.* Buffalo, 54 Hun (N. Y.) 80; Cincinnati *v.* James, 36 Ohio L. J. 219, 44 N. E. Rep. 925, 55 Ohio St. 180; Ardrey *v.* Dallas, 13 Tex. Civ. App. 442, 35 S. W. Rep. 726; Dietz *v.* Neenah, 91 Wis. 422, 64 N. W. Rep. 299.

But an injunction will not be granted merely because the assessment is excessive, or the work has been improperly performed, or in any other case where the property owner has an adequate remedy at law. Strenna *v.* Montgomery, 86 Ala. 340; Regenstein *v.* Atlana, 98 Ga. 167, 25 S. E. Rep. 428; Craft *v.* Kochersperger, 173 Ill 617, 50 N. E. Rep. 1061; Callister *v.* Kochersperger, 168 Ill. 334, 48

N. E. Rep. 156; Heinroth *v.* Kochersperger, 173 Ill. 205, 50 N. E. Rep. 171; Studabaker *v.* Studabaker (Ind.), 51 N. E. Rep. 933; McEneney *v.* Sullivan, 125 Ind. 407; Dever *v.* Junction City, 45 Kan. 417; Hilliard *v.* Asheville, 118 N. Car. 845, 24 S. E. Rep. 738; Hoffeld *v.* Buffalo, 130 N. Y. 387; McKee Land & I. Co. *v.* Swikehard, 51 N. Y. Supp. 399; Haff *v.* Fuller, 45 Ohio St. 495; Thrall *v.* Williamsport (C. P.), 18 Pa. Co. Ct. 330; Riddle *v.* Charleston, 28 S. E. Rep. 831, 43 W. Va. 796.

Validity of Special Assessment—Estoppel.—See Wakely *v.* City of Omaha *et al.*, 1 Mun. Corp. Cas. 557, *notes*, 560 *et seq.*

WHEELER

v.

CITY OF POPLAR BLUFF.

(*Supreme Court of Missouri, Feb. 21, 1899.*)

Providing for Street Improvements—Statutory Requirements.—Under the laws of Missouri, a city of the third class can only improve its streets by passing a lawful ordinance, or a resolution with the same formality as an ordinance, for such purpose; and the passing of a mere general ordinance, prescribing the manner and method of reducing its streets to the established grade, is not an ordinance requiring a certain street to be reduced to such grade.

Same—Same—Validity of Contract.*—There can be no recovery against a city of the third class under a street improvement contract entered into without compliance with a statutory provision that a city of the third class, must, as a preliminary step, declare by ordinance the necessity of a contemplated improvement.

Estoppel.—The doctrine of estoppel cannot be applied to validate such a contract.

Contracts—Assuming Risk of City's Failure to Comply with Statutory Requirements.—A contract for street improvement provided that a special tax should be levied to pay the cost of the work; that special tax bills should be accepted in payment; and that the contractor should assume all risks for failure of the city to comply with the requirements of law in assessing and levying such tax. *Held*, that such provisions of the contract were binding upon the contractor.

Exercise of Legislative Powers—Liability of Municipalities.*—No action lies against a city for the negligent exercise of its legislative powers.

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*See notes at end of case.

Wheeler *v.* City of Poplar Bluff

APPEAL by plaintiff from Madison county circuit court. *Affirmed.*

Geo. L. Edwards, for appellant.
Henry N. Phillips, for respondent.

BURGESS, J. This is an action by plaintiff, as assignee of one Z. T. Allbright, against the city of Poplar Bluff, a city of the third class, to recover the sum of $6,042.52, with interest, alleged to be due plaintiff, as such assignee, on a contract entered into between Allbright and defendant city for reducing to the established grade parts of Main and Vine streets, in said city. The answer admits the incorporation of defendant city, the passage and publication of the resolution of October 17, 1892, mentioned in the petition, and also the passage and approval of an ordinance on November 21, 1892, as entitled No. 188, which is also mentioned in plaintiff's petition, but denies that this ordinance gave Allbright or any other person any power, authority, or any direction to do any of the acts alleged to have been done by plaintiff or Allbright, or that said ordinance was in any way connected with or referred to, or that it gave to said resolution any force or validity; denies defendant's liability under the alleged contract, or in any manner whatever; alleges that Wheeler was fully paid for any and all work of any and all kinds that he or Allbright executed within said city under the alleged contract or otherwise; and denies all other allegations in the petition. The case was tried by the court, a jury being waived. No declarations of law were asked or given. There was judgment for defendant; hence this appeal.

Case Stated.

On the 17th day of October, 1892, defendant city passed a resolution declaring it necessary that parts of Main and Vine streets, in the city, be reduced to the established grade, and, the general revenue fund of said city not being in a condition to warrant an expenditure for any such purposes, that the cost thereof be paid by special tax bills issued against all lots and pieces of ground on either side of such streets

the distance improved or to be improved, in proportion to the front foot thereof. It was also further resolved that the resolution be published in the Advocate, a newspaper published in the city of Poplar Bluff, for two consecutive weeks. On November 21, 1892, defendant passed an ordinance (No. 188) by which the manner and method of reducing its streets to the established grade are prescribed. This seems to be a general ordinance, having reference to no particular street or streets. Thereafter defendant caused preliminary estimates of cost of reducing to the established grade parts of Main and Vine streets, as alleged in the petition, to be made and submitted to it, which it accepted and approved. It then caused its street commissioner to advertise for bids for grading parts of the streets for which compensation is claimed in this case; and, in pursuance thereof, Allbright became the purchaser of the contract, which was awarded to him, and perfected on the 9th day of March, 1893. On May 10, 1893, Allbright assigned his contract to the plaintiff. The grading was done according to contract, and the work accepted by defendant. Thereafter defendant, by resolution of its board, ordered that a special assessment be made for the cost of said work against the abutting property holders, and that special tax bills be issued against them, respectively, therefor, and to be delivered to Wheeler, which was done. The tax bills proved to be worthless, having been issued without authority, but Wheeler collected upon them $1,636; so that, if entitled to recover at all, it is the balance due under the contract, less amount collected.

Plaintiff insists that, by virtue of either section 1495 or section 1514 of defendant's charter (Rev. St. 1889), it had express power to enter into the contract sued on, and that such power is neither limited nor in any way modified by any other section of its charter, except section 1497, which provides that "before the council shall make any contract for building bridges, sidewalks," etc., "and grading any street," etc., "estimates of the cost thereof shall be made

Providing for Street Improvements—Statutory Requirements.

by the proper officer and submitted to the council, and no contract shall be entered into for any such work or improvements for a price exceeding such estimates." But we are unable to concur in this view. Section 1514, in our opinion, confers no additional powers upon cities, with respect to the improvement of streets, not conferred by section 1495. Being in *pari materia*, it cannot be held to dispense with the necessity of a special ordinance providing for the improvement as required by section 1495, nor with the estimate provided for in section 1497. Indeed, the section seems to have been principally designed to point out the mode of securing compensation, as by seciton 1524, and for the reversion of title in case of vacation of streets, alleys, or squares, and for reopening the same, and to protect private owners against changes of grade. By section 1495, *supra*, cities of the third class are authorized by ordinance to open and improve streets and make sidewalks, and build bridges, culverts, and sewers; and for the purpose of paying for opening, widening, and bringing to grade all streets, avenues, and alleys, and for the building of bridges, culverts, and public sewers, and for foot walks across streets, etc., have the power to assess all taxable property within the limits of the city, not exceeding five mills on the dollar for these purposes in any one year. Section 1498 provides that when the city council shall deem it necessary to pave, macadamize, curb, gutter, or otherwise improve any street, etc., for which a special tax bill is to be levied, it shall, by resolution, declare such work necessary, and shall cause such resolution to be published, etc., that the resident owners of property liable to taxation therefor may have the right to protest against the improvement, if they see proper, and if a majority of them do not protest against the improvement, and not otherwise, to cause such improvement to be made, and to contract therefor, and to levy taxes to pay for the same. As the city council did not in the first place declare by ordinance that in their judgment the revenues of the city would not justify the payment of the cost of bringing the streets upon which the work was

done up to grade, the cost thereof could not be charged against the abutting property, under the provisions of section 1495, *supra*. Nor could tax bills be issued against such property under section 1498 because the council did not by ordinance cause the grading to be done, contract therefor, or order a levy of taxes for the purpose of paying for the work, which could only be done by ordinance (Moore *v.* City of Cape Girardeau, 103 Mo. 470, 15 S. W. 755; City of Nevada *v.* Eddy, 123 Mo. 546, 27 S. W. 471), or by resolution passed with the same formality as an ordinance; and in the absence of an affirmative showing, as in the case at bar, that the resolution was passed with the same formalities required in the passage of an ordinance, it would seem to be invalid. Nor can a general ordinance authorize such work to be done. City of Cape Girardeau *v.* Fougeu, 30 Mo. App. 551; City of Poplar Bluff *v.* Hoag, 62 Mo. App. 672. By section 1501 it is provided that: "The city council may, by ordinance, include in the special assessment the cost of bringing to the established grade any street * * * proposed to be improved, under the provision of section 1498, when in their opinion or judgment the general revenue fund of the city is not in a condition to warrant an expenditure for bringing the same to the established grade: provided, that the resolution declaring such work necessary to be done, and published in the newspaper doing the city printing, as required in said section, shall, in addition to the other work of improvement therein provided for, include and describe the work of bringing such street, avenue, square or alley, or part thereof, to the established grade. In all such cases, when such work is authorized by virtue of such a resolution, and is contracted for in pursuance thereof, the bringing to grade as above described shall be included in the same contract with other work provided for therein, and tax bills shall be issued in payment for all said work as may be provided for by ordinance." JUDGE BIGGS, in passing upon this section, and the same contract sued on in this case, in City of Poplar Bluff *v.* Hoag, 62 Mo. App. 675, said: "The meaning of

the foregoing section is reasonably plain. If an unimproved street needs to be opened and improved, and the general revenue fund of the city is such that, in the judgment of the city council, an expenditure for bringing the street to grade at the public expense would not be warranted, then the cost of it may be made a special charge against the adjacent lots, provided the city council shall first declare by ordinance that, in their judgment, the revenues of the city would not justify the expense of the improvement, and then include, in the published resolution for the other improvements of the street, a description of the additional work. When these things have been done, and no protest is made, the entire work may be ordered; and the last clause of the section provides that the entire work shall be included in the same contract. Now, it is quite evident that in the case at bar the city council has failed to take the necessary steps to charge the defendant's property with the cost of bringing the street to grade. In the first place, it passed no ordinance, but simply declared by resolution that, in its judgment, the revenue of the city would not justify the grading of the street at the public expense. This did not meet the requirements of the statute, unless the resolution was adopted by the same formalities required in the passage of ordinances, which was not the case, as appears from the averments in the petition." City of Springfield *v.* Knott, 49 Mo. App. 613; City of Cape Girardeau *v.* Fougeu, 30 Mo. App. 551. Such work as that for which compensation is claimed can only be done, in cities of the third class, by ordinance or resolution passed with the same formality; and plaintiff's contention that, without ordinance or resolution to authorize it, defendant's council, by its charter, was empowered to enter into the contract sued upon, is without authority to support it. As we have said, there was no ordinance to authorize the work in question. The resolution of the council of October 17, 1892, did not authorize it. Nor did Ordinance No. 188, as that was a general ordinance, having no special reference to the grading in question, and did not authorize the work. An ordinance

Same—Same—Validity of Contract.

substantially the same as this, in connection with a preliminary resolution also like the one of October 17, 1892, was before the court in City of Nevada *v.* Eddy, *supra*; and the court, with respect thereto, observed "that the resolution is the preliminary expression of opinions of the council that the improvements are necessary. * * * The resolution was never intended to dispense with the ordinance. Each performs its separate function." It was ruled in that case that cities of the third class can only improve their streets by passing a lawful ordinance for that purpose, and that "the passing of a mere general ordinance, prescribing the specifications as to guttering, curbing, etc., when deemed necessary, is not an ordinance requiring certain streets to be improved."

It is further insisted that as the work was done according to contract, and defendant received it and derived its benefits, it should be estopped from denying the validity of the contract. But, whatever the rule may be elsewhere, it has been ruled by this court that the doctrine of estoppel "cannot be applied to validate a contract which the corporation had no power to make." State *v.* Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, and 35 S. W. 1132, and authorities cited. Moreover, the contract sued on provides "that, upon completion of the work contemplated by the said contract, the first party, Z. T. Allbright, that said second party would cause an assessment to be made against all of the property owners owning lots or pieces of ground abutting on said street to be improved, and the levying of a special tax thereon, to be paid and special tax bills to be issued in conformity with said assessment levied in favor of the said first party, in full payment of said street grading ; said party (Allbright) hereby agreeing to assume all risks for failure to comply with said ordinances and laws aforesaid by the said second party. * * * And the said first party hereby agrees to accept said special tax bills, issued as aforesaid, in full payment and discharge of said second party for the doing of work herein contracted for."

Estoppel.

Contracts—Assuming Risk of City's Failure to Comply with Statutory Requirements.

Notes

And to permit plaintiff to recover in this action would be to do so in violation of the terms of his own contract, upon which he seeks to recover. In passing upon a case very much like this, in Keating *v.* City of Kansas, 84 Mo. 415, SHERWOOD, J., in speaking for the court, said: "It is well-settled law that, for the nonexercise or the defective exercise of its public or legislative power, a municipal corporation is not liable to any one who suffers injury in consequence thereof. 2 Dill. Mun. Corp. 949. In the attempted passage of the defective ordinance, the city, of course, was engaged in the exercise of legislative powers. McCormack *v.* Patchin, 53 Mo. 33. And for the negligent exercise of such powers no action lies. Keating was bound to take notice, at his peril, of the defective ordinance, when dealing with the officers of the defendant, and cannot urge against the city, in this suit, such defects or want of power in such officers. [Citing 1 Dill. Mun. Corp. 447; Cheeney *v.* Inhabitants of Brookfield, 60 Mo. 53.] * * * If, after all this, he can indirectly recover from the city, it must be confessed that neither the city charter nor his contract has any binding force. Both the charter and contract, it will be observed, are so broad and comprehensive in their terms that any recovery against the city is denied to the plaintiff in any form of action whatever. The requirements of the charter in such cases is the only touchstone of corporate liability, and upon that the contractor with the city must rely. To establish any rule to meet the hardships of a particular case would result in incalculable mischief, and the overthrow of the organic law of the city." Our conclusion is that the judgment of the court below should be affirmed, and it is so ordered.

Exercise of Legislative Powers—Liability of Municipalities.

GANTT, P. J., and SHERWOOD, J., concur.

NOTES.

Special Assessment Proceedings — Compliance with Statutory Requirements for Protection of Property Owner. — See *notes*, 1 Mun. Corp. Cas. 560 *et seq.*

Notes

Municipal Corporations—Ultra Vires Contracts.—See Holder *v.* City of Yonkers, 1 Mun. Corp. Cas. 164, and extensive *note*, 167 *et seq.*

Same—Legislative Powers—Liability.—No action lies against a city for the negligence, exercise or nonexercise of its discretionary powers of a public or legislative character.

United States.—Fowle *v.* Common Council of Alexandria, 3 Pet. (U. S.) 398.

Alabama.—Campbell *v.* Montgomery, 53 Ala. 527, 25 Am. Rep. 656; Davis *v.* Montgomery, 51 Ala. 139; Smott *v.* Wetumpka, 24 Ala. 112.

Connecticut.—Hewison *v.* New Haven, 37 Conn. 475.

Georgia.—Forsyth *v.* Atlanta, 45 Ga. 152; Rivers *v.* City Council of Augusta, 65 Ga. 376, 38 Am. Rep. 787.

Illinois.—Joliet *v.* Verley, 35 Ill. 58, 85 Am. Dec. 342; Freeport *v.* Isbell, 83 Ill. 440, 25 Am. Rep. 407; Alton *v.* Hope, 68 Ill. 167; Goodrich *v.* Chicago, 20 Ill. 445.

Indiana.—Peru *v.* Gleason, 91 Ind. 566, 5 Am. & Eng. Corp. Cas. 435; Walker *v.* Hallock, 32 Ind. 239; Anderson *v.* East, 117 Ind. 126, 10 Am. St. Rep. 35; Baker *v.* State, 27 Ind. 485; Kaulkner *v.* Aurora (Ind.), 2 Am. & Eng. Corp. Cas. 520.

Iowa.—Van Horn *v.* Des Moines (Iowa), 4 Am. & Eng. R. Cas. 339; Ball *v.* Woodbine, 61 Iowa, 83; Ogg *v.* Lansing, 35 Iowa, 495.

Louisiana.—Bennett *v.* New Orleans, 14 La. Ann. 120.

Maryland.—Flynn *v.* Canton Co., 40 Md. 312, 17 Am. Rep. 603.

Massachusetts.—Hill *v.* Boston, 122 Mass. 344; Hafford *v.* New Bedford, 16 Gray (Mass.), 295; Tainter *v.* Worcester, 123 Mass. 311; Randall *v.* Eastern R. Co., 106 Mass. 276, 8 Am. Rep. 327.

Michigan.—Detroit *v.* Beckman, 34 Mich. 125, 22 Am. Rep. 507.

Minnesota.—Lindholm *v.* St. Paul, 19 Minn. 245.

Mississippi.—White *v.* Yazoo City, 27 Miss. 357.

Missouri.—Armstrong *v.* Brunswick, 79 Mo. 319, 8 Am. & Eng. Corp. Cas. 404. See Kansas City *v.* Killey, and note (Mo.), 13 Am. & Eng. Corp. Cas. 446, 450.

Nevada.—McDonough *v.* Virginia City, 6 Nev. 90.

New York.—Griffin *v.* Mayor, etc., of N. Y., 9 N. Y. 456, 61 Am. Dec. 700; Levy *v.* Mayor of New York, 1 Sandf. (N. Y.) 464; Seaman *v.* Mayor, etc., of N. Y., 80 N. Y. 239, 36 Am. Rep. 612; Saulsbury *v.* Ithaca, 94 N. Y. 27, 46 Am. Rep. 122; Hines *v.* Lockport, 50 N. Y. 239; Wilson *v.* Mayor, 1 Denio (N. Y.), 595; Cole *v.* Medina, 27 Barb. (N. Y.) 218.

North Carolina.—Hill *v.* Charlotte, 72 N. Car. 55.

Ohio.—Western College of Medicine *v.* Cleveland, 12 Ohio St. 375.

Pennsylvania.—McCade *v.* Chester, 117 Pa. St. 414, 20 Am. & Eng. Corp. Cas. 440; Fair *v.* Philadelphia, 88 Pa. St. 309; Carr *v.* N. Lib-

erties, 35 Pa. St. 324; Easton *v.* Neff, 102 Pa. St. 474, 43 Am. Rep. 213; Grant *v.* Erie, 69 Pa. St. 420, 8 Am. Rep. 272; Norristown *v.* Fitzpatrick (Pa.), 8 W. N. C. 459.

South Carolina.—Black *v.* Columbia (S. Car.), 2 Am. & Eng. R. Cas. 640.

Tennessee.—Cole *v.* Nashville, 4 Sneed (Tenn.), 162.

Wisconsin.—Kelley *v.* Milwaukee, 18 Wis. 83.

RUSHTON *et al.*

v.

CITY OF ALLEGHENY *et al.*

(*Supreme Court of Pennsylvania, Oct. 6, 1899.*)

Coal Chute in Sidewalk — Personal Injuries — Nonsuit.*—In an action against a city, the property owner, and his lessee, for personal injuries caused by a fall into a coal hole in the center of a sidewalk, it appeared that the grating over the chute at the time of the accident was such as was permitted by the municipal authorities, and like others in general use; that it was slightly inclined, and was not bolted down, but this was the usual condition of such gratings in the city. *Held*, that unusual precautions to prevent such accidents are not required, and a nonsuit was properly entered.

APPEAL by plaintiffs from Allegheny county court of common pleas. *Affirmed.*

The opinion of the court below reads as follows: "It is undoubtedly true that a nuisance in a public highway is none the less a nuisance because many others like it are maintained. We cannot, however, in this case, get to the point where this consideration aids us, without begging the entire question at issue. Of course, one who maintains such a nuisance is liable in damages to a party specially injured by it. If, then, we hold a coal-vault grating to be a nuisance *per se*, we decide the case in plaintiffs' favor without more. But it is a well-known fact, and is admitted by plaintiffs' witnesses, that such grat-

*See notes at end of case.

ings are permitted by the municipal authorities, and are in general use; and it is also well known that such accidents as that out of which this suit grows do not often occur. Doubtless, when a party is permitted to make an opening like this in a highway, he should be held to a high degree of care in maintaining it in safe condition; but we are of the opinion that, in this state at least, the law is that there must be some evidence to indicate that the particular grating was more likely to cause an accident than the hundreds of gratings over which people pass daily with safety, before a jury can be permitted to find that it is a nuisance, or that the party who maintains it is guilty of negligence. There does not seem to be such evidence in this case. The grating in two feet was sunk a half inch on one side and elevated a half inch on the other. There was a piece broken off the frame, but the break did not extend to the flange which holds the grating in place. The grating was not bolted down, but this is the usual condition of such gratings. These facts did not seem to us sufficient to carry the case to the jury. The fact that the grating was afterwards fastened down might properly go to the jury with other evidence of negligence. But, under the circumstances of this case that alone will not entitle plaintiff to go to the jury. The rule which admits such facts as evidence of negligence no doubt often causes persons to permit dangerous conditions to continue, for fear of strengthening the evidence against them. To say that such act will make a case for the jury, where none exists without it, would greatly increase the evil effects of the rule, and is not necessary to the attainment of just results. Beyond any question, an accident sometimes reveals dangers of which no one would have thought before it occurred. Possibly, were a second accident to occur with respect to this grating, the fact that it was a second one might carry the case to the jury, even though the witnesses failed to point out any defect to which the accident could be attributed. At all events, when an accident has occurred, the person upon whose premises it has happened,

however confident he may be that he has been guilty of no negligence, should be willing, afterwards, from motives of humanity, to adopt any reasonably practicable additional precautions against its recurrence. Possibly, the municipal councils should, by ordinance, abolish or modify the use of these gratings in the streets. But, assuming this to be a correct conclusion, it is not for the courts to assume councils' functions, and accomplish the end by changing a rule of law, and holding individuals liable for failure to take unusual precautions. On the whole case, and after a careful reconsideration of it, we are of opinion that the nonsuit was properly granted."

Samuel J. Graham, for appellants.
Elliott Rodgers and *Stone & Potter*, for appellees.

McCollum, J. The plaintiff Mary Rushton claims $30,000 as damages for an injury she received in May, 1895, by a fall into a coal hole or chute in the center of a sidewalk on Federal street, in Allegheny City; and her husband, Henry Rushton, claims $10,000 to compensate him for the loss or impairment of her services, for medical treatment provided for her, and for the extra help required because of her disability. The evidence descriptive of the injury received is not disputed, and the only question to be determined is whether the evidence in the case is sufficient to charge the city, the owners of the property abutting on the sidewalk at the point of the casualty, the lessee in possession of the same, or either of them, with negligence. At the close of the evidence on the part of the plaintiffs the defendants moved for a compulsory nonsuit, and their motion was sustained. The nonsuit was followed by a motion of the plaintiffs to take it off, which motion, upon due consideration of it by the court, was denied. It is a circumstance worthy of note that the defendants in the suit are the city, the owners of the property abutting as aforesaid, and the lessee of the owners. The joinder of the city with the owners of the property and their lessee as defendants shows that the plain-

Notes

tiffs were not able to specify the party chargeable with the alleged negligence, and that it had its origin in their hope of establishing negligence on the part of at least one of the several parties thus united. We agree with the learned court below that the plaintiffs cannot maintain their suit without proof of the negligence charged in the statement of their claim. The evidence to sustain the charge must be such as would authorize a jury in finding the material fact as alleged, and evidence which falls short of this does not meet the requirements of the law. If, therefore, the evidence in the case at bar is not sufficient to support the controlling charge, it was the plain duty of the court, on the motion of the defendants, to enter a compulsory nonsuit, and to deny the plaintiffs' motion to take it off. The coal holes or chutes in the sidewalks of Allegheny City are authorized by the municipal authorities, and compliance with the regulations relating to them is all that is required of the owners or tenants of the abutting properties. The coal hole or chute in question is, in its location and construction, like the great majority, if not all, of the coal holes or chutes in said city. It was familiar to Mrs. Rushton, and, according to her own testimony, she passed over it at least twice a week during a period of five years immediately preceding her fall. None of the hundreds of pedestrians who passed over it daily before and after the occurrence in question received any injury from it, or complained at any time to any of the defendants or other persons of a defect in it. All the undisputed facts in the case were opposed to the plaintiffs' contention, and the testimony submitted by them on the trial was clearly insufficient to sustain the charge of negligence against either of the defendants. A careful perusal and consideration of all the testimony warrants this conclusion. It follows that the court below did not err in entering or refusing to take off the nonsuit. Judgment affirmed.

NOTES.

Streets and Sidewalks—Municipality only Bound to Use Reasonable Care to Keep in Safe Condition.—See generally *note*, 1 Mun. Corp. Cas. 58.

Notes

Defective Streets and Sidewalks—Personal Injuries—Liability of Abutting Owners.—In the absence of legislation, an abutting landowner is not liable, to an individual injured by a defect in the highway in front of his premises, unless the defect was caused by or occurred in some structure erected by or for him in, over, under, or near the street. This was distinctly held in Jansen *v.* City of Atchison, 16 Kan. 358. At pp. 386, 387, where the court in delivering the opinion, said: "The city has the possession and control of street and walk. Any work done above or below the surface, is presumptively done by it; and for any injury resulting from any obstruction or excavations it is responsible; and it has a claim over against an individual only when it appears that such obstruction or excavation was made by the individual, or at his instance, or for his benefit. The liability of the individual is no greater because the injury took place on the sidewalk than if it happened in the middle of the street, or from falling into a sewer rather than into an area. The only principle upon which the individual can be held responsible is, that the individual caused the injury—not that he owns a lot in front of which the injury was done." See also Hartford *v.* Talcott, 48 Conn. 425, 40 Am. Rep. 189; Gaston *v.* Bailey (Ind. App.), 43 N. E. Rep. 254; Jansen *v.* Atchison, 16 Kan. 358; Kirby *v.* Boylston Market Association, 14 Gray (Mass.) 249; Independence *v.* Slack (Mo.), 34 S. W. Rep. 1094; Goltz *v.* Griswold (Mo. Sup.), 20 S. W. Rep. 1044; Weller *v.* McCormick, 47 N. J. L. 397, 11 Am. & Eng. Corp. Cas. 537; Babbage *v.* Powers (N. Y. App.), 29 N. E. Rep. 132; Sammins *v.* Wilhelm, 6 Ohio Cir. Ct. R. 423; Chambers *v.* The Ohio Life and Trust Co., 1 Disney (Ohio) 327; Van Dyke *v.* Cincinnati, 1 Disney (Ohio) 532; Morris *v.* Woodburn, 57 Ohio St. 330, 39 Ohio L. J. 72, 48 N. E. Rep. 1097; Wilhelm *v.* Defiance, 39 Ohio L. J. 294, 58 Ohio St. 56, 40 L. R. A. 294, 50 N. E. Rep. 18; Defiance *v.* Wilhelm, 12 Ohio C. C. 346, 1 Ohio C. D. 669; Raymond *v.* Keseberg, 91 Wis. 191, 64 N. W. Rep. 861; Selleck *v.* Tallman, 93 Wis. 246, 67 N. W. Rep. 36; Toutloff *v.* Green Bay (Wis.), 65 N. W. Rep. 168.

Coal Holes.—Where personal injuries result from the existence of a coal hole in a sidewalk, the abutting owner cannot be held liable therefor, unless he has been guilty of some negligence, either with respect to its construction or maintenance. See Stevenson *v.* Joy, 152 Mass. 45, 25 N. E. Rep. 78; Delory *v.* Canny (Mass.), 11 N. E. Rep. 656; Mancuso *v.* Kansas, 1 Mo. A. Rep. 218, 74 Mo. App. 138; Gordon *v.* Peltzer, 56 Mo. App. 599; Kehoe *v.* Halpin, 65 Mo. App. 343; Kirkpatrick *v.* Knapp, 28 Mo. App. 427; Matthews *v.* DeGroff, 13 App. Div. 356, 43 N. Y. Supp. 237; Wells *v.* Sibley, 9 N. Y. S. 343; Kuechenmeister *v.* Brown, 1 App. Div. 56, 37 N. Y. Supp. 95; Canandaigua *v.* Foster, 156 N. Y. 354, 50 N. E. Rep. 971, 41 L. R. A. 554;

Jennings *v.* Van Schaick (N. Y.), 15 N. E. Rep. 424; Dickson *v.* Hollister, 16 A. 484, 123 Pa. St. 421, 23 W. N. C. 128.

Same—Not Nuisance Per Se.—A coal hole in a municipal sidewalk, when properly maintained, is not a nuisance *per se*. Korte *v.* C. G. Lewis Coal Co., 54 Minn. 530, 56 N. W. Rep. 246; Benjamin *v.* Metropolitan Street R. Co., 133 Mo. 274, 34 S. W. Rep. 590.

ENGSTROM

v.

CITY OF MINNEAPOLIS.

(*Supreme Court of Minnesota, Nov. 29, 1899.*)

Personal Injuries—Right of Action—Notice to City.*—Bausher *v.* City of St. Paul, 75 N. W. 745, 72 Minn. 539, adhered to as to the necessity of complying with the provisions of Laws 1897, c. 248, as a condition precedent to the right to maintain an action.

(Syllabus by the Court.)

APPEAL by plaintiff from Hennepin county district court. *Affirmed.*

W. S. Dwinnell, for appellant.

Frank Healey and *L. A. Dunn*, for respondent.

COLLINS, J. The only question raised by this appeal was disposed of in Bausher *v.* City of St. Paul, 72 Minn. 539, 75 N. W. 745, in which it was held that Laws 1897, c. 248, requiring notice to cities and villages of an injury for which damages were claimed, is mandatory, and that such notice is a condition precedent to the right to maintain an action to

*See *note*, 1 Mun. Corp. Cas. 478; Frost *v.* City of Casselton (N. Dak.), 2 Mun. Corp. Cas. 521; Roberts *v.* Village of St. James (Minn.), 2 Mun. Corp. Cas. 331; Sachs *v.* City of Sioux City (Iowa), 2 Mun. Corp. Cas. 732; Missano *v.* Mayor, etc., of New York (N. Y.), 2 Mun. Corp. Cas. 654; Ziegler *v.* City of West Bend (Wis.), 2 Mun. Corp. Cas. 333. Sheehy *v.* City of New York (N. Y.), 2 Mun. Corp. Cas. 684; Lyons *v.* City of Red Wing (Minn.), 1 Mun. Corp. Cas. 479.

recover such damages. See, also, Doyle *v.* City of Duluth (Minn.) 76 N. W. 1029. We have no occasion to add to what was said in these cases in support of the conclusion reached. They were properly determined, in our opinion. Because of some statements of appellant's counsel in his brief, it is well enough to say that we have not held that special charter provisions providing for notice of injuries have been repealed by chapter 248. The question has never been before us, and is not in this case. Order affirmed.

HUGHES

v.

CITY OF AUBURN.

(*Court of Appeals of New York, Nov. 28, 1899.*)

Defective Sewers—Injuries to Health—Liability of Municipality.*—In the construction and maintenance of a sewer or drainage system, a municipal corporation exercises a part of the governmental powers of the state, and in the exercise of such discretionary functions the municipality cannot be required to respond in damages to individuals for injury to health, resulting either from omissions to act, or the mode of acting; and the fact that a sewer from which such an injury results was originally constructed by the municipality across the lot, of the party injured, without right or authority, cannot be material in this connection.

Same—Same—Action for Death—Statute.—The statute of New York which permits actions for damages by reason of death caused by the wrongful act, neglect, or default of another has no application to an action against a city by the representatives of one who died from disease superinduced by the neglect of sanitary precautions on the part of the city authorities in the construction or maintenance of a sewer system.

APPEAL by defendant from Fourth department appellate division supreme court. *Reversed.*

*See *notes*, 1 Mun. Corp. Cas. 77 *et seq.*

Hughes *v.* City of Auburn

Case Stated.

This is an appeal from an order of the appellate division in the Fourth department sustaining the plaintiff's exceptions to the direction of a verdict for the defendant and granting a new trial. The action was brought by the plaintiff, in her representative capacity, to recover the statutory damages in cases of death caused by the wrongful act or neglect of another. It is alleged in the complaint, and the proof tended to show, that some years prior to the year 1881 the defendant caused to be built across a private lot a dry stone sewer for the purpose of disposing of surface water. Subsequently the defendant made use of the same as a part of its general sewer system for draining a portion of the city. It appears that this dry stone sewer was not sufficient to carry off the sewage conducted into it from the general drainage system of the city, and as a result sewage was frequently discharged into the plaintiff's cellar, and gave rise to foul and sickening odors and vapors, which were detrimental to health and life. It was charged that, although the defendant had had notice of these facts, and had been requested to remedy the defects, it had neglected to do so; that the plaintiff's daughter became ill in 1891, and that during that year, and down to the time of her death, in 1892, through the continued use by the defendant of this sewer, sewage was deposited in the cellar of the plaintiff's house and in the soil surrounding it, generating foul air, whereby her daughter's illness was aggravated and death caused. It appeared that this dry stone sewer had been constructed by the city upon the line of a natural water course, for the purpose of discharging the water thereof, as well as the surface water of the adjoining lands. Its sides and top were made of flat stones laid dry, without cement or mortar, and its bottom was of boards, upon which the walls rested. It was neither intended nor suitable for the reception and discharge of house sewage. The defendant had never acquired from any person the right to construct it, but the then owner of the lot was assessed for a portion of the cost of construction. The plaintiff's grantor had made a con-

nection with this sewer and the cellar of the house by a tile drain. The plaintiff purchased the premises in 1881, some years after the sewer had been constructed and the connection made with it by the tile drain. The house was used as the home of the plaintiff and her family. Some years afterwards the defendant caused to be constructed, in another and higher part of the city, a system of sewers for carrying away the general sewage of houses and stables, and caused them to be discharged into the dry stone sewer or drain upon the plaintiff's premises, at a point just above the same. The sewer across the plaintiff's lot, which has been referred to, was used for this purpose down to the year 1893, when an adequate sewer was constructed by the defendant along the route of the old drain. Before this change had been made the condition of things described existed, and at times of continued rains and heavy showers sewage was forced into the cellar from the old dry stone sewer, and water charged with sewage would rise therein to the height of from one to four feet, and upon the recession of the water a deposit of sewage would be left which emitted very offensive odors, permeating all the rooms of the house, rendering them damp and unwholesome. The plaintiff complained of the condition of the house to the common council and to the board of health of the city, and the board of health adopted a resolution to the effect that the sewer was a nuisance, and that the common council be requested to remedy it. The latter, by resolution, directed the city surveyor to report upon a plan for the sewage of the territory affected by the nuisance. In September, 1889, the city surveyor reported a suitable plan to dispose of the sewage affected by the nuisance, but nothing was done by the defendant in regard to it until about the date above referred to, and during this time sewage was permitted to be discharged as before. The plaintiff's daughter had no legal or equitable estate in the premises, but merely resided there with her mother at the family home. In the latter part of 1891 she was taken ill, and died in May, 1892. About a week before her death occurred the family moved

out of the house. The evidence tended to show that the health of the other members of the family had been affected, but after leaving the premises they had recovered. A physician who attended the deceased testified that her illness and death were caused by her sanitary surroundings. At the close of the evidence the defendant's counsel moved the court for a direction of a verdict in its favor, upon various grounds, among which were the following: That no negligence had been shown, or any which was the proximate cause of the death; that the deceased did not own any property affected by the sewer; that the plaintiff could have abated the nuisance by disconnecting the house drain from the sewer; that the defendant owed no duty to the deceased; and that her death was caused by tuberculosis, which is a disease not communicated by sewage. The motion was granted, and the exceptions taken in behalf of the plaintiff were directed to be heard in the first instance at the appellate division.

L. A. Pierce, for appellant.
Frank C. Cushing, for respondent.

O'BRIEN, J. (after stating the facts). The plaintiff seeks in this action to recover the damages resulting from the death of her daughter, a young girl, about 22 years old at the time of her death, in the month of May, 1892. She died from a disease which one of the physicians described as catarrhal pneumonia, caused or aggravated by the unwholesome atmosphere of the house where she lived with her mother. It is alleged that in consequence of offensive air and dampness in the house, caused by sewage entering the cellar from the drains and sewers constructed by the defendant, the deceased contracted the disease from which she died, or that it was so aggravated from these causes that death resulted. The facts have already been stated, and they need not be repeated here. They show that in November, 1881, the plaintiff purchased and went into possession of a frame dwelling house in Auburn with her family, including this daughter, then about 11 years old. The lot on which the

house stood was about 4 rods wide and 10 deep. At that time, and for many years before, there had been, about 6 feet under the surface of the soil of the lot, what is called a "stone drain" or "dry stone sewer," connected with the general drainage system of the city. This drain had been built across the private lot by the city, and, it is claimed, without having acquired any right from the owner, though it appears he contributed to the expense by payment of an assessment on the property, and made a connection into it from the cellar of the house by means of a tile drain. This was the situation when the plaintiff purchased the house and moved into it. Subsequently the city greatly enlarged the drainage area which was originally intended to be drained by this sewer, and by this action, as well as by neglect to change or enlarge the sewer, the city sewerage was forced into the cellar, which produced the unhealthy condition of the house described.

We must assume, in the present condition of the record, that the death of the plaintiff's daughter is traceable to the neglect of the defendant in failing to correct the causes which rendered the plaintiff's house unwholesome. The question will then arise whether that is a sufficient legal basis for the statutory action for damages resulting from the death, and, further, whether such neglect to observe sanitary rules can be said in such cases to be the natural and proximate cause of death, within the meaning of the rule of liability for negligence.

The right of the plaintiff to maintain this action depends upon the right of the deceased herself to maintain it had she survived the sickness resulting in her death, and this suggests the inquiry whether an individual who has suffered from disease, superinduced by the neglect of the authorities of a city or village to observe sanitary laws in the construction or maintenance of a system of sewerage, can recover damages for the injury from the municipality. If one member of a family can, so can every member; and if one family may, so may every family, and every person who can give proof

enough to carry the case to the jury. It matters not what the disease may be or the cause, so long as it may be traced by proof to some act or neglect on the part of the municipal authorities. There are few communities where places or conditions may not be found that generate disease, and, if the municipality may be charged with the results traceable to these conditions, it is indeed subject to a liability more serious and far-reaching than has heretofore been recognized.

The progress made in recent times in sanitary science has, doubtless, done much to stimulate and develop this idea. It is comparatively easy for the mind to reach the conclusion that the remedies of the law should always keep pace with modern progress in everything that concerns the welfare of the individual, and, in a certain sense, that notion may be quite correct. But advances in that direction, when deemed necessary or healthful, must be the work of legislation; since the courts can only apply to new conditions old and settled principles, and in this process of development a point is soon reached where the power of the court ends and the duty of the legistator begins. There is no statute that I am aware of that would authorize an action against the defendant by the deceased on the facts disclosed by this record, had she lived. If an individual injured by disease produced by the acts or neglect of a city, such as are stated in the complaint, can recover damages at all, it must be upon some principle of the common law; and, had it been suggested half a century ago that such a principle existed, the assertion would have been received with some surprise. In the form in which this case comes here, there is ample room to urge in argument elements of individual hardship well calculated to disturb the mind and divert it from the questions of law that underlie the action. On the principle that there can be no wrong without a remedy, courts are sometimes astute to discover grounds for relief in cases of this character, that, when applied as general principles to like cases, are found to be exceedingly inconvenient, if not untenable, and hence, very frequently, have to be distinguished, modified, or

entirely abandoned. The principle upon which the judgment in this case rests is that an individual who has suffered from disease, caused by the neglect of a city to observe sanitary laws with reference to its sewer system, may recover damages from the city. This principle, if sanctioned and applied generally to all cases coming within its scope, cannot fail to produce evils much more intolerable than any that can possibly arise from such acts of omission or commission as the plaintiff states as the basis of this action. It must necessarily become the prolific parent of a vast mass of litigation which the municipality can respond to only by taxation, imposed alike upon the innocent and the guilty. The arguments to sustain such a principle are evidently based upon a misconception of the relations that exist between the individual and the city. The latter is but a creature of the state, engaged in exercising some of the functions of government in a limited locality, not for any private purposes, but solely for the public good. It is unfortunately true that governments, both general and local, have in all ages of the world inflicted upon the communities whose interests they had in charge the most grievous wrongs and calamities. Wars, pestilence, and famines innumerable, besides almost every other evil that has afflicted mankind, may be traced directly to the neglect or wrongdoing of persons exercising public authority, but no system of jurisprudence has yet recognized the right of the individual injured by such acts or neglect to compensation in damages from the government in consequence of such neglect or wrongdoing. A municipal corporation is nothing more than an instrumentality of the state for the purpose of local government, exercising delegated powers, which the state itself can exercise and may withdraw at pleasure. It is difficult to perceive how the body politic and corporate which we call a city can be liable to an individual for such acts or neglect as the record discloses as the foundation of this action, unless the state itself would be liable, in the exercise of the same powers, for the acts or neglect of its officers of the

same character. The state may resume the powers delegated, and could it then be said that it would be liable to an individual who had suffered from disease in consequence of neglect to enact or observe sanitary rules? The remedy for most of the evils incident to the exercise of governmental power, whether in the state itself or in localities, is to change the administration. The law in most cases must proceed upon the principle that it is wiser and better for the members of a political community, general or local, to endure some of the evils that they have, rather than fly to remedies such as are invoked in this case, that are certain in the end to bankrupt the treasury and involve them in endless strife and litigation.

I cannot perceive that the plaintiff's case is helped in the least by the fact that the sewer was originally constructed across the lot on private property, without right or authority. Indeed, that fact, if important at all, tends to show that she acquiesced in the situation, since, if it be true that the sewer was built on the land without right, she could have enjoined its use by the city or closed it entirely. The probability is that her grantor, who contributed to the expense of constructing it, in some way promoted the action of the city in order to secure drainage for his cellar, and the plaintiff, by her purchase and occupation of the house as she found it, succeeded to this situation. Searing *v.* Village of Saratoga Springs, 39 Hun, 307. It is doubtless true that a city may not conduct sewage into the house or upon the premises of an individual, and, if it does, is responsible to him in damages for the trespass or the nuisance. But that is an injury to property, for which the owner alone may demand redress; and since in this case the deceased was not the owner or in possession of the house, but merely a member of her mother's family, she had no right of action for the trespass. Kavanagh *v.* Barber, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689. For the personal suffering incident to sickness caused by the defendant's neglect of sanitary precautions to guard against disease she would have no remedy except such as

was common to every other member of the community who was similarly afflicted. In the construction and maintenance of a sewer or drainage system, a municipal corporation exercises a part of the governmental powers of the state for the customary local convenience and benefit of all the people, and in the exercise of these discretionary functions the municipality cannot be required to respond in damages to individuals for injury to health, resulting either from omissions to act, or the mode of exercising the power conferred on it for public purposes, to be used at discretion for the public good. I have attempted to state some of the reasons that underlie this principle, and their application to this case, with the evil results that must follow any departure from it.

Defective Sewers—Injuries to Health—Liability of Municipality.

The principle is sanctioned by the highest authority in this and other jurisdictions. Where a fire insurance company was compelled to pay a loss for property destroyed by fire which it had insured, and it sued the village where the property was to recover the damages resulting from the wrongful and negligent acts of the corporation in omitting to keep its waterworks and fire appliances in proper condition, and to employ competent men to manage the same, this court held that the grant of power to the village to do all these things was made in its public, municipal, or political capacity, and that it could not be held liable to respond in damages for any nonuser or misuser of such powers. Springfield Fire & Marine Ins. Co. *v.* Village of Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660. The principles so well stated in the opinion in that case apply with full force to the one at bar. The obligation of a municipality to observe sanitary precautions against disease in the construction or maintenance of a sewer system cannot be greater or different from the obligation or duty to provide safeguards against the calamity of fire. Where a private party sued a city for damages arising from the creation of a nuisance by the city upon his premises in constructing a sewer system with so narrow an outlet that the sewage was set back into

the plaintiff's cellar through a drain which he had constructed by permission of the city to connect with the sewer, it was held that the action could not be maintained. Buckley *v.* City of New Bedford, 155 Mass. 64, 29 N. E. 201. There the plaintiff sought only to recover for the damage to the realty, and not for any injury to health, and hence the principles upon which the decision proceeded apply with the greater force to the present controversy. Where an insane person was injured in an institution maintained by the county for the care of the insane, through the alleged negligence of some of the officers and servants of the county in charge, it was held that the county was not liable upon the principle which exempts municipal corporations from liability for neglect in the nonuser and misuser of powers delegated by the sovereign power for the public benefit. Hughes *v.* Monroe Co., 147 N. Y. 49, 41 N. E. 407. A more diligent examination would doubtless discover numerous other cases that would furnish a complete answer to the plaintiff's contention, which, it must always be remembered, is that a city is liable in damages to an individual injured, or suffering loss or damage by disease caused by the neglect of the city authorities to observe proper sanitary precautions in the construction or maintenance of its sewer system, since that is the only ground upon which the deceased could rely had she survived and brought the action herself.

A municipality, like an individual, is responsible for wrongdoing resulting in injury to property, when the owner asserts such a claim, and to the public for personal injuries chargeable to neglect in the exercise of its powers and duties over streets and the like, but in the latter cases the liability rests upon some positive duty enjoined. It is bound to use reasonable care to the end that highways may be safe, but no positive duty rests upon it to construct or maintain a system of sewers for the protection of health. It may have extensive powers in that respect, but their exercise rests largely in the discretion of the authorities, and for an omission to act at all, or for some action that may appear to be

unwise, or even negligent, where there is no actual invasion of property rights, but merely a failure to accomplish the desired end in the promotion or protection of health, the individual has no right of action.

Whether, under any circumstances, death from disease can be held to be the natural or proximate result of such wrong or neglect as the defendant is charged with in this case is a question not argued. It has been held that damages for injury to health and business resulting from a defective sewer may be included in an action by the owner of a house against a city, negligently causing leakage from a sewer to enter the cellar. Allen *v.* City of Boston, 159 Mass. 324, 34 N. E. 519. But the plaintiff does not bring this action in her right as owner, but as the personal representative of her deceased daughter, to recover the damages to the estate of the deceased under the statute. She can therefore assert no right that the deceased herself could not have asserted had she lived. The statute which permits actions for damages by reason of death caused by the wrongful act, neglect, or default of another has no application to an action against a city by the representatives of one who died from disease superinduced by the neglect of sanitary precautions on the part of the public authorities in the construction or maintenance of a sewer system. The order of the appellate division should be reversed, and that entered upon the decision at the trial affirmed, and the defendant should have judgment on the verdict, with costs. All concur, except GRAY and BARTLETT, JJ., dissenting. Order reversed, etc.

Same—Same—Action for Death—Statute.

JUDD *et al.*

v.

CITY OF HARTFORD.

(*Supreme Court of Errors of Connecticut, Oct. 27, 1899.*)

Drains and Sewers—Failure to Remove Obstructions—Flooding Property—Liability of City.*—Where the cause of sewerage being forced in to abutting property, to its injury, during a severe, but not extraordinary, rain storm, is the negligence of the agents of a city in failing to remove obstructions from an adequate sewer, which were placed there for temporary purposes, the city cannot escape responsibility on account of its public character.

Judgment against City—Lack of Funds.—A municipal corporation cannot avoid a judgment for a common-law liability by pleading that it has no money on hand out of which it can be paid.

APPEAL by defendant from Hartford county superior court. *Affirmed.*

Case Stated.

The finding stated the following facts: The plaintiffs owned a store on High street, in Hartford. The defendant city in 1873 laid a sewer in the street, with which the store was connected, and which was adequate to drain the area that it was built to drain. The owners of the store were assessed for benefits, and paid the assessment. On July 29, 1897, the city was engaged in building an intercepting sewer to divert the sewage from the High street sewer and other sewers from an outlet theretofore used into Park river, and send it into the Connecticut river. For this purpose the city had cut off the High street sewer 100 feet below the plaintiffs' store, and constructed a manhole there, with a 12-inch pipe at the bottom, running into the intercepting sewer, and a 24-inch brick storm-water sewer at the top, running under High street, in the line of the old sewer to the Park river. A stone was set as a dam in the

*See *notes*, 1 Municipal Corporation Cases 77 *et seq.*

lower part of this storm-water sewer, to keep all sewage out of it, leaving only the storm water to flow over the dam. These sewer connections on High street were completed by July 1st, and were adequate to the purposes for which they were designed. The city's agents had previously used a wooden "center" in constructing the 24-inch storm sewer, on which to turn the arch forming the upper half of said sewer at the point where it left the manhole. This center had a solid semicircular board head, measuring 24 inches across the base. After the arch was built, instead of removing the center, as should have been done, it was negligently left by the defendant's agents lying across the lower portion of the storm sewer, so as to obstruct the flow of water. A fortnight before July 29th the defendant's agents also blocked up the outlet from the manhole in the intercepting sewer with bags of sand, to prevent any sewage or water from flowing through it into another manhole situated below it, which they were then constructing. By these two obstructions the capacity of the outlet of the High street manhole near the plaintiffs' store was reduced to a quarter of the capacity of the sewer leading into this manhole. No notice of these obstructions was given to the plaintiffs. There was a severe rainstorm on July 29th, which filled the High street sewer, so that by reason of these obstructions the water and sewage were forced into the plaintiffs' store, doing serious damage. The defendant claimed that the storm was an act of God, for the consequences of which it could not be held liable; that leaving the center in the sewer was an error of judgment, for which it was not liable in damages; that the service performed by the defendant in the construction of said sewer was one in which the defendant had no particular interest, and from which it derived no special benefit, in its corporate capacity, and that negligence of the employees of the defendant in the construction of said sewer was not imputable to the defendant; that it was authorized to build sewers for the public when the public necessity required, and assess the expense upon properties specially benefited, and that no

obligation rested upon the defendant to make the sewers and drains constructed under such authority sufficient and ample, and no obligation thereafter existed to keep the same free from defects and obstructions; that the contractors, employees, and appointees of the street department and public works are not the agents and servants of the city, charged with a public service, for whose negligence in the discharge of a governmental duty an action lies against the city without being expressly given; that no right of action existed against the city because none was given by charter or statutes, and that the construction of this sewer was a public, governmental duty, to remove a nuisance; and that it is not liable for the negligence of some or all of its agents, whom it is obliged to employ, and not liable for the negligence of the agent, if any, in the construction of the sewer, or in a matter outside of such construction and entirely collateral thereto. The court, however, rendered judgment against the city for $2,940 damages.

William J. McConville, for appellant.
Arthur L. Shipman, for appellees.

BALDWIN, J. (after stating the facts). The city was held liable to the plaintiffs, not because it planned and constructed an inadequate sewer, but because, after planning and constructing an adequate sewer, it left obstructions in it, placed there for temporary purposes, which its agents carelessly omitted to remove after those purposes had been accomplished. For negligence in such matters a municipal corporation cannot escape responsibility on account of its public character. It is a person in law, capable of inflicting injuries, and liable to suit by him who suffers them, unless they flow from, or are incident to, the performance of a governmental duty. Municipal duties are governmental when they are imposed by the state for the benefit of the general public. They may sometimes have that character, also, when imposed in pursuance of a general policy, mani-

Drains and Sewers—Failure to Remove Obstructions—Flooding Property—Liability of City.

fested by legislation affecting similar corporations, for the particular advantage of the inhabitants of the municipality, and only through this and indirectly for the benefit of the people at large. Jewett *v.* City of New Haven, 38 Conn. 368. Whether an instance of this nature is furnished by the provisions of the defendant's charter respecting the construction and maintenance of sewers, it is unnecessary to inquire. The injury to the plaintiffs was due to no fault of plan or construction, and to no omission to make proper repairs. It was of the same nature as one that might be suffered by the occupant of a new house who strikes his foot, in a dark passage, against an ax, or stumbles over a heap of shavings, which the builder's workmen have carelessly left upon the floor. The failure to sweep out the shavings or pick up the tools is something distinct from the work of building the house. It could only occur after the building was finished. So, even if the charter duty of the defendant as to the construction or alteration of the sewer with which the plaintiffs' store was connected was governmental, its duty, after that had been performed, to clean up and remove any temporary appliances which, if left where they were, would render the sewer unserviceable or inadequate, was a new and ministerial one. It was a simple and definite duty, arising under fixed conditions, and implied by law. State *v.* Staub, 61 Conn. 553, 568, 23 Atl. 924. No one else could perform it. The sewer was part of the defendant's property, and under its exclusive control. Its functions in regard to its construction or reconstruction had been discharged; the occasion for an exercise of those as to its repair had not arrived; and, if its agents had before been acting as agents of the law, they now acted, or neglected to act, as its proper servants, subject to the full application of the ruleof *respondeat superior*. Norwalk Gaslight Co. *v.* Borough of Norwalk, 63 Conn. 495, 530, 28 Atl. 32. "Municipal immunity does not reach beyond governmental duty." Weed *v.* Borough of Greenwich, 45 Conn. 170, 183. Had the city authorities

expressly directed the workmen employed upon the sewer not to remove the "center" or the sand bags, when to allow them to remain was to turn this piece of city property into a nuisance to those who had paid for the right to share in its use, and were dependent upon its efficiency for the enjoyment of the houses and stores which it was built to serve, an action could certainly have been maintained for any resulting injury. Mootry *v.* Town of Danbury, 45 Conn. 550, 556; Hoyt *v.* City of Danbury, 69 Conn. 341, 351, 37 Atl. 1051; Morgan *v.* City of Danbury, 67 Conn. 484, 496, 35 Atl. 499. It lies equally in the absence of such directions. The cause of action is the failure to remove the obstructions. Whether this was an intentional or an unintentional omission of duty is immaterial. Nor is it of any consequence that the city, in altering its sewerage system, was relying upon funds derived from bonds issued under an amendment to its charter (Sp. Acts 1893, p. 429), which provided that the sums thus borrowed should be used for such alterations, or for purchase of real estate for parks, "and for no other purposes whatsover." It cannot avoid a judgment for a common-law liability by pleading that it has no money on hand out of which it can be paid. That the storm which was the immediate occasion of the flooding of the plaintiffs' cellar was a severe one can constitute no defense. It was severe, but not extraordinary. Diamond Match Co. *v.* Town of New Haven, 55 Conn. 510, 526, 13 Atl. 409. There is no error. The other judges concurred.

Judgment against City—Lack of Funds.

CITY OF VALPARAISO

v.

HAGEN *et al.*

(*Supreme Court of Indiana, Oct. 25, 1899.*)

Drains and Sewers—Polluting Water Courses—Injunction.*—A municipal corporation, acting in conformity to the statutes, skillfully and without negligence or malice, pursuing the only natural and reasonably possible line of drainage, will not be enjoined from discharging its sewage into a natural water course, though it thereby pollutes its waters, to the injury of the lower riparian proprietors.

Same—Same—Same—Eminent Domain.—The fact that the waters of the stream in flood time carry the sewer filth out upon the pasture of one of the lower riparian proprietors, thereby lessening the value of his estate by a destruction of the grass and the creation of personal discomfort, does not entitle him to enjoin the city upon the ground that such damage constitutes a taking of private property for a public use, which must be preceded by just compensation.

Exercise of Lawful Authority—Future Conditions—Injunction.—Injunction will not lie to restrain the exercise of a power lawfully conferred until it is shown that the power has been abused to the injury of public or private right.

APPEAL by defendant from Porter county circuit court. *Reversed.*

A. D. Bartholomew, for appellant.

Agnew & Kelly, for appellees.

HADLEY, J. Valparaiso is a city of 8,000 inhabitants. Salt creek is a natural water course flowing from south to north through the western part of the city, and thence west and north to its confluence with the Calumet river. Its fall is 15 feet per mile, and its minimum volume 227 cubic feet of water per minute. Within the city limits on the southwest is a low-lying marsh that naturally drains into Salt creek. The natural and only practicable

Case Stated.

*See note at end of case.

drainage for all the territory within the city limits is Salt creek. Prior to 1896 the city had constructed, according to law, a general and complete system of sewerage for the city, at a cost of $50,000, and 200 closets and 500 kitchens had been connected therewith; and the outfall from the entire system was into the marsh at the southwest, at a point about 64 rods from Salt creek. About 47,000 gallons of sewage are being daily discharged into the marsh. The marsh is heavily overgrown with grass and other vegetation, but sewage in some form finds its way into Salt creek, and pollutes its waters. Above the point of sewage contact there are three slaughter houses that drain directly into Salt creek, and one rendering establishment and one gas works drain into near-by tributaries. Nine-tenths of 1 per cent. of the water in Salt creek below the sewer discharge in time of low water is sewage coming from the city, the slaughter houses, and other polluting agencies above. Appellant is threatening and has arranged for an extension of the outlet directly through the marsh to Salt creek. The plaintiffs, 19 in number, are the owners and occupants of lower lands abutting on Salt creek at distances from two to ten miles from and below Valparaiso. The action is for an injunction precluding the city from discharging sewage into Salt creek. The complaint sets forth the several interests of the plaintiffs in the subject-matter: That Salt creek, before the grievances mentioned, was a natural water course and a perpetually running stream of pure water flowing by and through the lands of the plaintiffs, and was used by them for domestic, agricultural, and dairy purposes; that defendant city has 8,000 inhabitants, and is situate upon Salt creek at a point higher and up stream from the lands of the plaintiffs; that the city had theretofore constructed and put into use a large and complicated system of sewers, and had permitted 500 houses and closets to be connected therewith; that the sewers were so constructed that they emptied all the sewage of the city into the marsh on the southwest, a short distance from Salt creek, and that the sewage, being discharged in great quantities into the marsh,

overflowed and ran into Salt creek, whereby the waters of the creek became polluted, filthy, and unwholesome, and the banks of the creek became lined and overflowed with sewage, slops, excremental filth and garbage, and the lands of the plaintiffs contiguous thereto, and which were used for pasture, have been and are being overflowed by said substances, and the grass so befouled that the plaintiffs' stock would not eat it, nor drink the water in the stream; that noxious odors arise from the stream and permeate the air for half a mile, and injuriously affect the health and happiness of the plaintiffs and their families; that the city is threatening to and will accomplish and extension of the sewer through the marsh to Salt creek, and there and thereby empty all the sewage of the city directly into Salt creek above the plaintiffs' lands, and there and thereby greatly increase the pollution of the water, and render it unfit for any purpose, to the irreparable damage of the plaintiffs. Prayer, "that the city be enjoined forever from constructing said sewer outlet, or emptying the sewage of the said city into the said stream, or upon the said land at the place where it is now emptying, and from depositing the same into said creek at any point." A demurrer to the complaint was overruled and sustained to the second paragraph of answer. A trial was had upon the general issue, and finding and judgment perpetually enjoining the appellant from polluting or increasing the pollution of the waters of the creek by permitting its sewage to run into the waters of the stream.

Error is assigned upon the action of the court upon the demurrers and upon the overruling of appellant's motion to modify the finding and for a new trial. But, as suggested by the appellant, each assignment raises but a single and the same question, and they will therefore be considered together. That question is: May a municipality, acting in conformity to the statutes, skillfully and without negligence or malice, pursuing the only natural and reasonably possible line of drainage, be enjoined from discharging its

Drains and Sewers—Polluting Water Courses—Injunction.

sewage into a natural water course, thereby polluting its waters, to the injury of the lower riparian proprietors? It is a familiar principle that injunctive relief will not be granted if there exists a complete remedy at law, and, if the case falls within the class of *damnum absque injuria*, the denial is equally imperative. It is equally well established that every owner of land through which a stream of water flows is entitled to the reasonable use and enjoyment of the stream. His right to do so is not an acquired property right, but a natural right appurtenant to his freehold, and is in common and equal with all others owning land upon the stream. He may dam it and divert it for mechanical purposes and fish ponds, if he will return it to its channel before leaving his premises; he may use it for purposes of agriculture; his animals may take water from it at will; he may clear away the forests, plant crops, fertilize his field, feed his animals in lots, and permit the storm water from his fields and feed yards to flow by natural ways into the stream; or he may collect the surface water upon his premises, if all upon the water shed, into ditches, covered or uncovered, and, clean or unclean, may direct them into the stream, even though such drainage corrupts the waters of the stream and sends them on to the owners of the servient estates less pure than he received them. His enjoyment is, according to his position, superior to those below him and inferior to those above him. The right to improve and beautify property, and to employ all the reasonable methods afforded by the estate and its appurtenances, to protect the health and promote the comfort and happiness of self and family, is inseparably connected with the right to own and control property; and, though its exercise may sometimes injuriously affect others, the law affords no remedy. In acquiring estates and in erecting homes along water courses, notice must be taken of the conformation of the territory, the natural lines of drainage that farms, cities, and villages may gather along its banks, and that the impurities incident to the trades, to agriculture and population, that fall upon the surface, will find their way

into the stream, and that the enjoyment of the stream is liable to be modified and abridged, if not altogether suspended, in many uses to which it might originally have been fitted, by those above, in the exercise of their own equal rights. A municipality, in a large sense, is a riparian proprietor. Its officers stand for the corporation. They are empowered by the state to provide and enforce sanitary measures for the preservation of the health and welfare of the public. The corporation has the same right to exist as an aggregation, and to enjoy its possessions as a natural person. It may, under the law, establish public halls, libraries, and market places, and it may lay out parks and embellish them with flowers and fountains for the comfort and happiness of the corporate body. It may open and improve streets, construct gutters, sluices, and water ways; and if storm water carries into these latter the multifarious filth and garbage incident to populous places, and bears the same away by natural channels to the general water course of the basin, the right of the municipality to permit it will not be doubted, even though the waters of the stream are thereby so polluted as to render them unfit for ordinary uses. And wherein have the dwellers below ground of complaint? They have suffered only that which they should have reasonably expected and estimated in acquiring their property. The question is rooted in the natural law of self-preservation. And, if cities are permitted to adulterate streams by allowing all accumulating surface impurities to flow into them by natural channels, we do not perceive why the underlying principle will not allow them to deepen these natural storm channels and transform them into covered sewers, nor why the right to protect the health and welfare of the public against one class of noxious matter should not be extended to all classes of equal virulence. And, while action must be taken with a cautious regard for the rights of those below, it has come to be a scientific fact generally accepted that the minimum of mischief resulting from closet contents may be attained by an early dispatch through the medium of flowing water, wherein

solids are dissolved and chemical action for purification speedily takes place. But, however this may be, there is back of the question sovereign power, resting upon reasons satisfactory to the legislature, conferred upon cities to construct sewers and outlets, and, by necessary implication, authority to discharge the sewage into the usual and naturally adapted conduits. The grant of such powers imposes the duty to exercise them in all needful cases. This record shows that appellant is a city of 8,000 inhabitants; that between the years 1891 and 1896 the proper authority projected and constructed a complete system of sewers at a cost of more than $40,000, adopting for the outlet of the system the line of natural drainage for the district. It further appears that all parts of the city were ultimately drained into Salt creek within the city limits. And there is no pretense that there is any other possible outlet or practical means of disposing of sewage, or that the sewer was unskillfully or negligently constructed. Hence, then, to forbid a discharge of sewage into Salt creek is to deny to the city the right to discharge it anywhere, and thus leave it without the ordinary means of sanitation. Surely it is not the law that a salutary statute, essential to the health and welfare of the public, may be thus nullified by exhibiting a damage to private right. The sewage must be dispatched or the city abandoned. The place adopted for the outpour is that provided by nature, and cannot be had elsewhere. The facts present a case wherein the principle of the greatest good to the greatest number must be permitted to operate, and private interest yield to the public good; and if the erection has been skillfully performed, and without negligence, as is shown to be the fact by the record, and in a way to do the least mischief, it must be held to be a lawful exercise of power that equity will not restrain. Barnard *v.* Sherley, 135 Ind. 547, 34 N. E. 600, and 35 N. E. 117; City of Richmond *v.* Test, 18 Ind. App. 482, 501, 48 N. E. 610; Merrifield *v.* City of Worcester, 110 Mass. 216.

Same—Same—Same—Eminent Domain.

City of Valparaiso *v.* Hagen

That cities are not liable for consequential damages to private property, resulting from the construction of streets, sewers, and other public improvements, when the work is skillfully executed and free from negligence, is no longer an open question in this state. City of Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686, and cases there cited; City of Vincennes *v.* Richards, 23 Ind. 381. But appellees' counsel argues on behalf of one of the appellees that the waters of the stream in flood time carry the sewer filth out upon his pasture, whereby the grass is rendered worthless, and noxious odors are emitted, to the annoyance and harm of appellee and his family, and that this is a consequential damage, not to his natural rights in the stream, but to his acquired property rights; and that it is a taking of his private property for public use without compensation first being rendered. The lessening of the value of an estate by a destruction of the grass and the creation of some personal discomfort has only the same protection of the law that is accorded to other forms of injury to property by municipal improvements, and it has been uniformly held in this state that such consequential damage is not such a taking of private property as must be preceded by just compensation. Cummins *v.* City of Seymour, 79 Ind. 491; Macy *v.* City of Indianapolis, 17 Ind. 267; City of Lafayette *v.* Spencer, 14 Ind. 399; Weis *v.* City of Madison, 75 Ind. 241; City of Lafayette *v.* Bush, 19 Ind. 326. See, also, Com. *v.* Alger, 7 Cush. 53, 85. It will not do to say that the stream and appellees' lands lying along the margins of Salt creek should have been condemned by the city to the right to dispatch sewage along the stream before proceeding to do so. According to the statement of appellant's counsel, the premises of appellees alleged to be affected are situate from two to ten miles by the stream from the corporate limits of the city; and, if the city is required to go so far to recompense sewage effect, where may it stop short of the sea? Appellant had lawful authority to exercise the right of eminent domain in securing an outlet for its sewage, but no such authority exists as will permit it to

seize upon the stream and its margins to relieve consequential damages. City of Richmond *v.* Test, 18 Ind. App. 482, 500, 48 N. E. 610, and authorities cited. Furthermore, the construction of sewers and outlets is sanctioned by the law, and what the law grants will not constitute a nuisance *per se*, public or private. And, if the law is obeyed, no actionable wrong will result. In any instance, however, an action may arise from want of due care in construction or repairs. But it must be presumed that all ministerial officers will perform their official duty, and cause no offense in their execution of the law. City of Elkhart *v.* Wickwire, 121 Ind. 331, 337, 22 N. E. 342. Hence injunction will not lie to restrain the exercise of a power lawfully conferred until the power has been abused to the injury of public or private right.

By the judgment appealed from appellant is "permitted to extend its sewer system from its present outlet to Salt creek, but is perpetually enjoined and restrained from polluting or increasing the pollution of the waters of the creek." The judgment is anomalous in that it expressly authorizes appellant to construct the proposed extension through the marsh to Salt creek, but forbids forever the pollution of the waters of the stream. Ordinarily the right to extend the active, operating sewer to Salt creek would carry with it the right to discharge the sewage usually and necessarily carried by it into the stream, which implies pollution of its waters; but the express prohibition must be held to preclude the emptying of any corrupting substances into the creek. Whether the judgment is intended to operate against the situation as it now exists, and against the voiding of sewage into the marsh, whence it escapes into Salt creek, or to conditions that may exist if and after appellant extends the sewer to the creek, is not clear; but if it relates to future conditions, as we have seen, injunction will not lie, and if to present conditions, the facts averred in the complaint and established by the evidence do not warrant it.

Exercise of Lawful Authority—Future Conditions—Injunction.

The complaint fails to aver the absence of skill or the want of due care, or that some other outlet could more reasonably be had, or that some other reasonable method of disposing of the city sewage is available; and, for reasons stated, it is insufficient to entitle appellees to the relief prayed. The demurrer to the complaint should therefore have been sustained. Judgment reversed, with instructions to sustain the demurrer to the complaint.

NOTE.

Drains and Sewers—Pollution of Natural Streams.—"A municipal corporation, in the lawful exercise of its power to construct a system of sewerage, may make use of a natural stream for the purpose of discharging sewers into it, without ordinarily incurring any liability on account of the pollution of such stream; but if such pollution arises from the faulty construction or unreasonable use of the sewers, or from the negligence of the corporation in the management of them, the corporation is liable." 10 Am. & Eng. Enc. Law (2d Ed.) 248, *citing* Walker *v.* Aurora, 140 Ill. 402; Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592; Morse *v.* Worcester, 139 Mass. 389, 9 Am. & Eng. Corp. Cas. 642.

In Richmond *v.* Test, 18 Ind. App. 482, 48 N. E. 610, it was held that a lower riparian proprietor could not recover of a city for the pollution of a stream by a properly constructed system of sewers where such stream is the natural drainage of the city.

CITY OF LAURENS

v.

ELMORE.

(*Supreme Court of South Carolina, July 6, 1899.*)

Occupation Licenses—Interstate Commerce.*—One, as agent of a foreign firm, was engaged in delivering portraits already sold in frames, with options to the purchasers to buy the frames, as set out in the contracts of sale of the portraits. The portraits and frames were manufactured by such firms in the foreign state, and sent to the

*See Chrystal *v.* Mayor, etc., of City of Macon, 2 Mun. Corp. Cas. 445, and *foot-note*.

City of Laurens *v.* Elmore

agent for delivery. *Held*, that, under the laws of South Carolina, the agent was not a hawker and peddler in selling, under such agreement, a frame to the purchaser of a portrait; and that a municipal ordinance requiring him, as a condition precedent to the right to carry on his occupation, within the corporate limits, to take out a license, was, as a regulation of interstate commerce, in violation of the federal constitution.

APPEAL by city from Laurens county common pleas circuit court. *Affirmed.*

F. P. McGowan and *W. R. Richey*, for appellant.

Ball, Simkins & Ball, for respondent.

POPE, J. This is an appeal from the judgment of the circuit court, which reversed the judgment of the mayor's court of the city of Laurens, wherein the defendant was adjudged guilty of the violation of an ordinance of such city, fixing a special license tax for all occupations carried on within said city of Laurens, S. C. It seems that the Chicago Portrait Company, of Chicago, in the state of Illinois, is engaged in the business of enlarging pictures or photographs, and selling frames to such pictures. This company carries on this work through agents, who deliver such work, when completed, under a contract previously made between the customer and said company. To purchase the frames is entirely voluntary, but the company only sends frames to its customers in contracts for enlarging pictures or photograph. Of course, it is lawful for the city of Laurens to exact a license from persons doing business within the limits of such city, unless the same contravenes the laws of the United States. The circuit judge held that the proposed special license was in contravention of the clause of the United States constitution which confides to congress the power to regulate interstate commerce. This court, in the recent case of State *v.* Coop, 52 S. C. 508, 30 S. E. 609, held that one who delivers a portrait already sold in a frame, with option to the purchaser to buy a frame, as set out in the contract of sale of the portrait, is not a hawker and peddler, under Code Cr. Proc. § 294, in selling the frame to

the purchaser of the portrait. This decision was bottomed upon the two prior cases of State *v.* Moorehead, 42 S. C. 211, 20 S. E. 544, and Alexander *v.* Greenville Co., 49 S. C. 527, 27 S. E. 469; and all these cases are decided in view of section 8, art. 1, of the constitution of the United States. If congress has had confided to it, under the terms of the federal constitution, the duty of regulating commerce between the states, its jurisdiction is exclusive; and the states can only exercise any interference with such commerce by special power given therefor by congress. No power has been confided by congress to the states of this Union, except in a few cases; and the present instance is not one of them. Hence the ordinance of the city council of Laurens now in question is unlawful, and therefore the circuit judge committed no error in the ruling appealed from. See Brennan *v.* City of Titusville, 153 U. S. 289, 14 Sup. Ct. 829. It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, A. J., concurs in result.

JONES, J. I concur in the opinion by MR. JUSTICE POPE in so far as it is held therein that the ordinance in question and the sentence thereunder are void, as an interference with interstate commerce, as applied to the act of the defendant in reference to the delivery of enlarged pictures or photographs as the agent of the Chicago Portrait Company, a resident of Chicago, Ill., pursuant to orders theretofore given. To this extent the ruling is in perfect accord with the decisions of the United States supreme court, a number of which are cited in the case of Brennan *v.* City of Titusville, 153 U. S. 289, 14 Sup. Ct. 829, referred to in the opinion by MR. JUSTICE POPE. But I am unable to agree in so far as the opinion holds the ordinance requiring a license to sell picture frames within the city of Laurens is void as applied to the act of the defendant in this case. The record, or brief, to which alone we may look for the facts of this case, shows that defendant "delivered the enlarged pictures

or photographs pursuant to orders theretofore given, and that he only sold picture frames to persons who had given orders for enlarged photographs." Here, then, is the distinct fact that the picture frames were not sold and delivered pursuant to any interstate order or contract therefor, I admit that, if the picture frames had been sold and delivered pursuant to the contract for delivery of the enlarged pictures, such sales and delivery would constitute interstate commerce, and would come under the principle announced in reference to delivery of the enlarged pictures. But in this case it does not even appear that the picture frames were manufactured aboard and imported into this state; much less, imported pursuant to an order therefor. Nor does it appear that the business of selling picture frames to a particular class of purchasers is so directly connected with the primary business of enlarging pictures as to be a necessary incident thereto. If the sale of picture frames is not merely convenient and advantageous, but is essential, to the business of enlarging pictures, such sale would doubtless be protected as interstate commerce along with the interstate business of which it is a necessary part. But the contract for the enlargement of the picture, not providing, at it might have done, for the sale and delivery of the frame, shows that the parties did not contemplate the sale of frame as a part of or essential to the transaction for enlarging the picture. Even if it should be imagined that, owing to the delicate nature of the work, the pictures were delivered in frame, with option to the customers to purchase a frame, if they desired, that would not make the sale of the frames while in this state an interstate transaction. Such commerce is domestic, and subject to the tax or license laws of the state, which do not discriminate against the citizens and products of other states. It is not contended that the ordinance discriminates. Nor is it intimated that the picture frames were sold in the original packages in which they were imported, if imported at all.

In the case of Machine Co. *v.* Gage, 100 U. S. 676, the supreme court of the United States held that a state tax on

peddlers of sewing machines, which applies alike to sewing machines manufactured in the state and out of it, is not repugnant to the federal constitution. In that case the machines sold were with the salesmen at the time of the sale, thus distinguishing from cases in which the sales were made by order or sample of goods not in the state at the time of the contract of sale. In the case of State *v.* Emert, 103 Mo. 241, 15 S. W. 81, the supreme court of Missouri, in a very able opinion, held that "the sale of goods which are in another state at the time of sale, for the purpose of introducing them into the state in which a regulation concerning their sale is made, is interstate commerce; and a tax upon them before they are brought into the state is a tax on interstate commerce. The imposition of a license tax on the person so making sale of them is also, in effect, a tax upon the goods, and illegal, because a state cannot tax goods beyond its jurisdiction; but as soon as the goods are brought into the state, and have become a part of its general mass of property, they become taxable the same as other similar property within the state." This was the case of a peddler selling a sewing machine as the agent of a nonresident manufacturer after the introduction thereof into the state of Missouri. On appeal to the supreme court of the United States, that tribunal affirmed the judgment of the Missouri court. Emert *v.* Missouri, 156 U. S. 296, 15 Sup. Ct. 367. The distinction is clearly drawn between attempts by state laws to tax property, or impose a license tax for selling the same, so as to burden interstate commerce therein, before introduction into the state and incorporation as a part of the property of the state, and such attempts after the property is so introduced; the former being in conflict with the commercial clause of the federal constitution, and the latter not, if not discriminatory. Brennan's Case, cited by MR. JUSTICE POPE, does not conflict with this view. In that the admitted fact was that Brennan, as the agent of the manufacturer of picture frames and maker of portraits, residing in Chicago, Ill., solicited orders in Pennsylvania for pictures and picture frames, exhibiting samples

of his pictures and frames, and, upon receiving orders for pictures and picture frames, the manufacturers forwarded the same direct to the purchaser. In such case the sale and delivery of the frames, as well as the pictures, was clearly an interstate transaction, and, as such, exempt from the direct burden placed thereon by the state law. I do not regard the case of State *v.* Coop, 52 S. C. 508, 30 S. E. 609, as decisive of this case. That case merely decides that one who delivers a portrait already sold, in a frame, with option to the purchaser to buy a frame, as set out in the contract of sale of the portrait, is not a hawker and peddler, under our statutes. The case was rested on the principle announced in State *v.* Moorehead, 42 S. C. 211, 20 S. E. 544, and Alexander *v.* Greenville Co., 49 S. C. 527, 27 S. E. 469, wherein it was held that a traveling salesman of an established agency in this state for the sale of a machine, who solicited orders, sold by sample, and occasionally sold the sample itself, was not a hawker or peddler, within the meaning of our statute. The court was careful to say: "This court does not undertake to say that the agent might not have sold the frames in such manner as to have violated the said statute, but the language herein used must be construed as applicable alone to the facts of this case, which show that the sale of the frames was a mere incident to the regular employment of the agent."

As the conviction and sentence by the mayor's court was for delivering enlarged photographs and selling frames for said pictures without a license, it is proper to affirm the judgment of the circuit court, reversing the judgment of the mayor's court; but, under my view as to the validity of the ordinance forbidding the selling of picture frames in the city of Laurens without a license, as applied to the facts appearing in the case now before us, the case, as it seems to me, should be remanded for a new trial before the mayor's court for the alleged violation of that ordinance.

NEW HAVEN STEAM SAWMILL CO.

v.

CITY OF NEW HAVEN.

(*Supreme Court of Errors of Connecticut, Oct. 5, 1899.*)

Change of Street Grade—Injury to Property—Measure of Damages.*—In an action against a municipality for injury to property caused by change of street grade, the measure of damages is the resulting difference in the market value of the property immediately before and immediately after, the injury.

Same—Injury to Tide Water Flats.—In such an action, nothing can be recovered for injury to that portion of abutting premises in which plaintiff has only such title and interest as an upland owner on tide water has in the flats between high and low water mark in front of his upland.

CASE reserved from New Haven county superior court. *Judgment advised for plaintiff.*

Case Stated.

The complaint in this case is an application to the superior court, in the nature of an appeal from the report of the bureau of compensation of said city,—accepted and confirmed by the board of common council,—finding the benefits and damages to the plaintiff's land by reason of a change in the grade of Chapel street to be equal. The report of the said bureau from which the appeal in this case was taken is the same from which the appeals in the two cases just considered were made (44 Atl. 228, 229), but refers to land situated on a different part of the same street. The case was tried to a committee, whose report sets forth the facts as follows: "The circumstances under which this action is brought are as follows: The city of New Haven raised the grade of the highway known as 'Chapel Street,'

*See note at end of case.

between East street and Mill river, beginning at the easterly curb line of East street at the old grade; thence easterly about 200 feet, rising to the crown of a new bridge over the freight tracks of the New York, New Haven & Hartford Railroad Company, where the present grade is 16 feet higher than the former grade; thence gradually falling to a point 800 feet east of the east line of East street, where the present grade is 5 feet 7 inches above the former grade; thence, about on a level, and about the same height above the former grade, to a new drawbridge over Mill river. In constructing said bridge and approaches, and in changing said grade, the city erected on each side of Chapel street perpendicular stone retaining walls in front of the premises of the plaintiff, which walls are 5 inches higher than the present grade of the street above given. Said walls vary, except for a short distance next adjoining East street, from 6 to 16 feet high, and are surmounted on each side of the street by an open iron railing about 4 feet high. Between said walls Chapel street is filled in solid across its full width to the new grade above given. The frontage of the New Haven Sawmill Company thus affected is 1,084 feet. Said change of grade is attributable to two distinct public improvements: The abolition of a grade crossing of the freight tracks of the New York, New Haven & Hartford Railroad Company over Chapel street, and the erection of a new drawbridge, taking the place of the old one, over Mill river. The original plans and specifications for the abolition of said grade crossing contemplated that the new grade of Chapel street should run out into the former grade at a point 800 feet east of the east line of East street; but subsequently the city of New Haven, for the purpose of providing a level approach to the new Mill River Bridge, ordered an additional raise in the grade of Chapel street, extending back to a point 500 feet east of the east line of East street. Between said 500-foot point and said 800-foot point the total change of grade of Chapel street is therefore due to the Mill River Bridge grade being superimposed upon the grade due to the abolition of said grade crossing.

Said grade crossing was abolished in consequence of an order of the railroad commissioners dated July 6, 1886, of which a copy is in evidence, and in consequence of the following additional proceedings: Said order was appealed from by the New Haven Steam Sawmill Company, and was amended and confirmed by a judgment of the superior court dated November 18, 1887, of which a certified copy is in evidence. Said order was again amended by the railroad commissioners December 23, 1887, and a copy of said amended order is in evidence. On November 6, 1896, a writ of peremptory *mandamus* was issued from the superior court, commanding the city of New Haven and said railroad company to obey said order and judgment. The Mill River Bridge improvement was constructed in pursuance of certain votes of the court of common council of the city of New Haven, copies of which are in evidence. The court of common council of the city of New Haven assessed damages and benefits equal to the plaintiffs' property on account of each of said improvements. George B. Martin is receiver of the New Haven Steam Sawmill Company, and as such appeals from the order of the court of common council assessing damages and benefits equal on account of said Mill River Bridge grade. I find that said New Haven Steam Sawmill Company and George B. Martin, as receiver thereof, are the owners of the premises described in the complaint. Taking first that part of the premises lying east of the 800-foot point, and in front of which the change of grade already described is entirely attributable to the Mill River Bridge improvement, I find that said premises consist of a tract of flats lying between high and low water mark, 334 feet on Chapel street, and, excepting the easterly 50 feet, some 270 feet deep on the average. In changing the grade of Chapel street the city of New Haven took and appropriated for the purpose of said Mill River Bridge improvement a strip of the plaintiff's premises about 4 inches in width along the entire length of 334 feet. Plaintiffs claimed damages for encroachment and for injury to the

value of the premises. I find that the plaintiffs were damaged by the encroachment above described in the sum of $33.40. I find that prior to the change of grade the market value of the above described premises was $45 a foot on Chapel street. The retaining wall in front of said premises is about 6 feet higher than the former grade of Chapel street, and materially obstructs the use of the water privilege in connection with Chapel street, and increases the cost of improving the flats. I find that the premises lying between the 800-foot point and the harbor line have been specially damaged by the Mill River Bridge change of grade, over and above all benefits, at the rate of $15 a foot, or $5,010, not including damage for encroachment already found. If the court shall find, upon the true construction of the said order appealed from, the damages to be recovered in this action include only the damage to the premises lying between the 800-foot point and the harbor line, then I find and report that the plaintiffs' premises have been specially damaged by said change of grade in the sum of five thousand and forty-three dollars and forty cents ($5,043.40) over and above all benefits." There was a remonstrance against the report, and a reply thereto. The case was then reserved for the advice of this court.

Henry Stoddard and *John W. Bristol*, for plaintiff.
William H. Ely, for defendant.

ANDREWS, C. J. (after stating the facts). The grade of Chapel street has been changed by the defendant city, and the land of the plaintiff adjoining that highway has been thereby damaged. It is clear that the plaintiff is entitled to recover damages to some amount. The defendant does not controvert this. Counsel for the city say that the committee has estimated damages on a wrong theory; that is, that the committee has estimated the damages on the theory that the plaintiff is the owner in fee of the land adjoining Chapel street, and which it claims has been damaged, whereas in fact the plaintiff is not the owner in fee, but has only such

Note

title and interest in the lands injured as an upland owner on tide water has in the flats in front of his upland. We are not able to see how the facts in the case support this claim of the defendant. The committee has not undertaken to determine what interest or title the plaintiff has in the lands. He says that the plaintiff's land has been damaged by the change of grade to the amount of $15 a foot on Chapel street; in other words, that the value of the plaintiff's land is, since the change in the grade, less than it was before that change, by $15 a foot. It does not appear that the quantity of the plaintiff's interest in the land enters in any wise into the estimate. The committee seems to have proceeded according to the rule approved by this court. Cook *v.* City of Ansonia, 66 Conn. 413, 34 Atl. 183; Holley *v.* Town and Borough of Torrington, 63 Conn. 426, 28 Atl. 613. The committee was correct in holding that the plaintiff has no right of way over the track of the railroad. Reading the order appealed from in the light of all the facts as they are set forth in the report of the committee in this case and in the two former cases (44 Atl. 228, 229), we are of the opinion that by the true construction of that order the damages to be recovered in this action should include only the damages to the premises lying between the 800-foot point and the harbor line, namely, $5,043.40 over and above all benefits. The superior court is advised to accept the report, and to render judgment for the plaintiff to recover of the city the said sum. The costs in this court will be taxed in favor of the plaintiff. The other judges concurred.

Change of Street Grade—Injury to Property—Measure of Damages.

Same—Injury to Tide Water Flats.

NOTE.

Change of Grade—Injury to Abutting Property—Measure of Damages.—In an action against a city for injury to property caused by change of street grade, the measure of damages is the difference in the market value of the property immediately before and immediately after the change of grade. Blair *v.* Charleston, 43 W. Va. 62, 26 S. E.

341, 35 L. R. A. 852; Joliet *v.* Adler, 71 Ill. App. 456; Dallas *v.* Leake (Tex. Civ. App.), 34 S. W. 338; San Antonio *v.* Mullaly, 11 Tex. Civ. App. 596; McCray *v.* Town of Fairmont (W. Va.), 2 Mun. Corp. Cas. 323; City of Louisville *v.* Hegan *et al.* (Ky.), 2 Mun. Corp. Cas. 284.

See also Walters *v.* St. Louis, 132 Mo. 1, 33 S. W. 441; North Alton *v.* Dorset, 59 Ill. App. 612; Seaman *v.* Washington, 172 Pa. St. 481, 33 Atl. Rep. 756; Philadelphia Ball Club *v.* City of Philadelphia (Pa.), 2 Mun. Corp. Cas. 738, and *note*, p. 755; Town of Norman *v.* Ince (Okla.), 2 Mun. Corp. Cas. 643.

ATTORNEY GENERAL

v.

PINGREE *et al.*

(*Supreme Court of Michigan, July 5, 1899.*)

Internal Improvement through Municipality—Constitutionality of Statute.—The section of the constitution of Michigan providing that "the state shall not be a party to or interested in any work of internal improvement nor engaged in carrying on any such work" renders a statute purporting to authorize a municipal corporation to engage in such enterprises unconstitutional.

Same—Same—Street Railways.—The statute of Michigan entitled "An act to authorize the city of Detroit to construct, acquire, maintain and operate street railways, and to construct extensions thereof" is repugnant to the section of the state constitution providing that "the state shall not be a party to or interested in any work of internal improvement nor engaged in carrying on any such work."

Mere Question of Municipal Ownerships of Street Railways Not Involved.—It was not necessary, in order to dispose of this case, to pass upon the question whether the city, under any circumstances, may build or buy lines of street railways in its streets, all lying within the city limits, and lease them upon such terms as the city authorities shall deem to be for the best interests of the citizens.

PERSONS claiming to constitute the Detroit street railway commission. *Judgment of ouster.*

Horace M. Oren, Atty. Gen., (*Elisha H. Fraser, Jasper C. Gates, Charles A. Kent*, and *Hinton E. Spalding*, of counsel), for relator.

Attorney General *v.* Pingree

John J. Speed (*Henry M. Duffield*, *Fred A. Baker*, *John C. Donnelly*, and *Charles D. Joslyn*, of counsel), for respondents.

MOORE, J. This is a proceeding brought to test the validity of an act approved March 24, 1899, entitled "An act to authorize the city of Detroit to construct, acquire, maintain and operate street railways, and to construct extensions thereof." The provisions of the act material to this discussion are as follows:

"The people of the state of Michigan enact:

"Section 1. That the common council of the city of Detroit be, and is hereby authorized and empowered to appoint by resolution at any time within the next twenty years, three persons, electors and free holders of said city, who shall constitute a board of commissioners, to be known as the Detroit Street Railway Commission. One of said commissioners shall be appointed for the term of two years, one for a term of four years, and one for a term of six years. Their successors shall be persons of like qualifications, and shall be appointed by the common council on the nomination of the mayor of said city at the expiration of said term for the term of six years. Vacancies shall be filled by appointment by the mayor, and persons so appointed shall hold office for the unexpired term. All members of said commission shall hold their offices, respectively, until their successors are appointed and qualified. Any person otherwise eligible may be appointed as aforesaid, notwithstanding he may hold other office, excepting that of alderman."

"Sec. 5. The said commission may in their discretion and upon such terms and conditions as they may deem advisable for the interests of said city acquire, by deed, lease or other satisfactory conveyance from the company or companies owning the same to said city, any street railway or railways ixisting at the time of the passage of this act and lying wholly within or partly within and partly without said city, operated by the same company or companies, together with the property, assets, rights, privileges," etc., "owned and used in connection with or pertaining to said railways, including

rights to routes belonging to such company or companies upon which a railway shall not be in operation, and may operate and maintain said street railways so acquired, for the carriage of passengers and freight for hire.

"Sec. 6. Said commission may provide for the payment of rentals or other obligations and may provide for a sinking fund for the discharge of any liens upon any of the property acquired by them, and may pledge the earnings and receipts of said railways for these purposes, and may use the earnings in operating and maintaining the same, and may use any surplus of earnings in acquiring any bonds secured by lien upon the property so acquired, or may use such surplus in making needed extensions or betterments to said railways. Said commission shall have no power to incur any obligation on behalf of said city except such as shall be chargeable only upon the railways and property so acquired and the earnings and increments and extensions thereof.

"Sec. 7. The said commission shall manage, maintain and operate any street railway so acquired or extended, and may purchase from the revenue thereof all lands, tracks, cars, motors, dynamos, machinery, equipments, tools and furniture necessary and useful therefor to be used in connection therewith, and may establish rates of fare for the carriage of passengers and freight, provided the rates of fare shall not exceed those now charged by the Detroit Citizens' Street Railway Company. In operating any railway so acquired, the commission may exercise such other general powers as are possessed or exercised by boards of directors of corporations organized under the laws of this state providing for incorporation of street railway companies.

"Sec. 8. After acquiring any railway or railways pursuant to section five hereof, said commission shall have the power to enter into agreements with any street railway company having a line of street railway, for or in relation to the exchange of tickets and transfers, and for the carriage of passengers, use of tracks or operation or cars, provided that such agreements shall not be inconsistent with or in violation

of the terms of the conveyance or contract mentioned in section five hereof."

"Sec. 11. All causes of action relating to or arising out of the owning, operating or control of any street railway constructed or acquired by said commission shall be prosecuted by or against said commission by the name herein designated and said commission shall carry into effect, pay or discharge any order, decree or judgment, in any suit or proceeding to which it shall be a party, in like manner as if the same were prosecuted or defended by said city: provided, that no action for negligent injury arising out of the operation of said railway shall be maintained unless it be commenced within one year from the time when the injury was received, nor unless notice shall be given in writing within thirty days from the time of such injury to the said commission, its secretary or attorney, of the time, place and circumstances of such injury and of the nature thereof.

"Sec. 12. Nothing in this act shall be construed as granting any franchise to any of the existing street railway companies, or as extending the life of any existing franchise, or as implying any franchise rights in case of reversion of the property to the grantors or their successors; and said commission is hereby expressly prohibited from granting or extending the life of any franchises under any of the powers conferred upon it by this act."

After the passage of the act the common council, at an adjourned special meeting, appointed the defendants as members of the commission, and they at once entered into negotiations for the purchase of the various street railways in Detroit.

The case is one of vast importance, not only because of the magnitude of the interests involved, but also because the law proposes an entirely new departure in this country, in relation to the ownership and management of one of the most important interests in the business world. We are not favored with precedents which will aid us, because, with all of their zeal and ability, counsel have not been able to find

where an undertaking just like this has been entered upon. We have, however, had the benefit, not only of well-prepared written briefs, but of such oral arguments as the learned counsel, who have given the questions involved special thought and investigation, cared to make. We have endeavored to give the case such attention as its importance deserves.

It is claimed on the part of the attorney general that the act is unconstitutional and void for the following, among other, reasons: "(1) Because said act undertakes to confer upon the city of Detroit authority to engage in a work of internal improvement, contrary to the provisions of section 9 of article 14 of said constitution. (2) Because said act undertakes to confer upon a municipal corporation powers which are neither local, legislative, nor administrative, contrary to the provisions of section 38 of article 4 of said constitution. (3) Because said act purports to give to said Detroit street railway commission, mentioned in said act, unlimited and unrestricted power to contract debts for, and loan the credit of, said city of Detroit, contrary to the tenor and effect of section 13 of article 15 of said constitution, which provides that the legislature shall provide for the incorporation and organization of cities and villages, and shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit. (4) Because the powers to contract and purchase sought to be conferred by said act upon said Detroit street railway commission cannot be either conferred upon or exercised by said commission, under said constitution. (5) Because said act attempts to clothe said Detroit street railway commission with legislative powers as to street railways, and the operation and management of the same. (6) Because said act is an unlawful interference with the right of local self-government vested by said constitution in the citizens of said city, in that it undertakes to take out of the control of the common council and board of estimates of said city the several matters of purely local concern, above mentioned, and vest the same in the said Detroit street rail-

way commission, which is a body the members of which hold their offices for long, appointive terms, are a law unto themselves, and are subordinate and responsible neither to said citizens nor to their representatives, in any manner or form."

Is the act contrary to section 9, art. 14, of the constitution? The section reads as follows: "The state shall not be a party to or interested in any work of internal improvement nor engaged in carrying on any such work, except in the expenditure of grants, to the state, of land or other property." It is doubtless true, as urged by counsel, that the state legislature is given a general grant of legislative power, and that its power to legislate is subject only to such limitations as are imposed thereon by the express or implied limitations contained in the constitution of the state or the constitution of the United States. To understand the force and effect of the provisions of our constitution in relation to the attitude of the state towards internal improvements, it may be well to consider the experience of other states, and of our own state prior to the adoption of our present constitution. The war of 1812 demonstrated the great need of a better system of intercommunication between the various portions of the country. The condition of the highways, both land and water, was such that troops and provisions could be moved but slowly and at great expense. This was also true of the products of the country. Succeeding the war of 1812, the state of New York entered upon the construction of the Erie Canal. Its construction was doubtless of great benefit to the agricultural and commercial interests of the state, and especially to the city of New York. Other states were prompted to follow the lead of New York, and projected the digging of canals, the improvement of waterways, and the construction of railroads. Nearly all the state constitutions adopted between 1830 and 1850 either gave the legislature permission, or made it mandatory, to "encourage internal improvements within the state." Many enterprises of this character were entered upon which were

ill advised. So many of them were undertaken, many of the states incurred obligations they were unable to meet. The rate of interest in these new countries was much higher than capital commanded in Europe. Money from there after 1830 was furnished almost without limit, to be invested in the various projects devised by the several states. The state debts increased from $13,000,000 in 1830 to $100,000,000 in 1838. After the financial crisis of 1837 came, foreign capitalists who sought to draw out this money were unable to do so. An effort to collect these obligations proved abortive. Upon one pretext or another, many of the states repudiated their debts made for internal improvements. The states most disastrously affected were Maryland, Pennsylvania, Indiana, Illinois, Louisiana, Mississippi, and our own state. 2 Cycl. Pol. Science, 571. For the period between 1835 until the financial panic of 1837 occurred, the state of Michigan had a wonderful growth. The opening of the Erie Canal, and the facilities for travel furnished by the Great Lakes, made it comparatively easy for the residents of New York, New Jersey, and New England who were seeking to better their condition to reach our borders. The climate was good, and the soil was fertile. The example of New York in constructing works of internal improvement was thought worthy of imitation. The constitution adopted upon the admission of the state into the Union provided: "Internal improvements shall be encouraged by the government of this state; and it shall be the duty of the legislature as soon as may be to make provisions by law for ascertaining the proper objects of improvements in relation to roads, canals and navigable waters, and it shall also be their duty to provide by law for an equal, systematic and economical application of the funds which may be appropriated to those objects." The governor of the new state, in a message to the legislature, called its attention to its duty to act under the constitutional provision. The legislature was not slow to respond. A canal was projected from Mt. Clemens to the mouth of the Kalamazoo river, and

one around the falls of the St. Mary. A number of state railroads were surveyed, and their construction entered upon. To meet the expense the governor was authorized to borrow, upon state bonds, issued for the purpose, $5,200,000. These bonds were all negotiated, though, owing to the failure of one of the companies and one of the banks which undertook to negotiate them, the amount for which they were negotiated never found its way into the state treasury. It became evident the amount of the loan would not begin to complete the internal improvements already begun. Then came the financial panic. Bankruptcy and financial ruin were upon every hand. The state, at a great sacrifice of its property, made an arrangement with its creditors which left its credit good, but left it very badly in debt. Cooley, Hist. Mich. 279; Camp. Hist. Mich. 495.

As the result of this experience, the state had the canal at the St. Mary's river, which was afterwards taken over by the federal government, and is now one of the most important improvements upon the Great Lakes; a short section of a canal, which has never been of any use, except to furnish water power to private parties; and some uncompleted railroads, which the people were glad enough to have sold to private corporations. JUSTICE COOLEY states the situation in detail (Cooley Hist. Mich. 289): "The works of internal improvement still remained on the hands of the state, and in the day of its poverty and trial they were continually calling upon a depleted treasury for money to keep them in progress. But now, that the great bubble of speculation and inflation was burst, it became plain to the comprehension of the dullest that some of the state projects were wild and chimerical, and they were abandoned altogether. Such was the case with the projected canal from Mt. Clemens to the mouth of the Kalamazoo river, which it is now seen would be worthless if constructed. The only works of much promise were the central and southern of the three railroads, which were now very well under way. But doubts were arising in the minds of the people whether the state had been

wise in undertaking the construction and management even of these,—whether it was possible for the state to do either the one or the other with the same prudence and economy as could private owners. These doubts soon matured into a settled conviction that the management of railroads was in its nature essentially a private business, and ought to be in the hands of individuals. By common consent it came to be considered that the state, in entering upon these works, had made a serious mistake; and the legislature, in an act for funding the loan bonds, invited proposals from state creditors for the purchase of the state railroads. The times were not then propitious; but in 1846 the Central and Southern Railroads, so far as they were then constructed, were sold by the state, to corporations which had been chartered for the purpose of purchasing. The aggregate price was two millions and a half,—a sum very much below what had been their cost to the state. But the people felt the roads were well off their hands, and, as has been said by one familiar with the whole history: 'Here virtually ceased to exist all our works of internal improvement. Nothing but the debris of our airy castles remainded, and that only to plague our recollections.' The two great railroads, when taken up by corporations, went rapidly forward to completion; and they soon became great national highways, whose utility to the state was quite equal to the highest expectations ever formed concerning them. Having all their bitter experience with internal improvements fresh in mind, when they formed a new constitution, in 1850, the people resolved to put it out of the power of the legislature again to involve them in extravagant projects. And here we reach another landmark, significant in itself, but especially notable when contrasted with the provision respecting internal improvements which has already been quoted from the constitution of 1835. In 1850 the people deemed it necessary to prohibit what in 1835 they commended, and they now provided that the state shall not subscribe to, or be interested in, the stock of any company, association, or corporation, and also that the state

shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work of internal improvement, nor engaged in carrying on any such work except in the expenditure of grants to the state of land or other property. These were very positive provisions, and by adopting them the people believed they had rendered it impossible that the projects of doubtful wisdom and utility should be engaged in at the public cost. But diseases in the body politic, like those in the human system, are likely to take on new forms from time to time, and they are not to be exorcised by words, or kept off by constitutional inhibitions. The mania for internal improvements at the cost of the public, when it returned fifteen years later under the administration of Gov. Crapo, took on the form of aid to railroad corporations by the several municipal bodies in the state. Such aid was being given in other states, and railroads, as a consequence, were being constructed with a rapidity never paralleled. Michigan was lagging behind the rest of the country. Why should this be so? Every town which should subscribe to the stock of a railroad would immediately receive a full return in the enhanced value of its landed property, and would have the stock besides. This was what was commonly said and commonly believed, and the legislatures, well reflecting the common desire, passed a general law under which townships and cities were to be permitted to vote aid to railroads. The railroads, under another general law, might be laid out anywhere by the projectors, at pleasure, so that monopoly in these public conveniences seemed to be effectually provided against. The governor vetoed the railway aid act, but the legislature passed it over his veto. The business of voting aid to railroads was soon active, and the most visionary scheme was found as likely to receive aid as any other,—perhaps more so, for more work would be done for it. Nothing is so easy as to build railroads, if it can be accomplished by dropping votes into a box. Only fossils and croakers will disturb the public mind by reminders that the sums voted must at some

time be paid, and that the roads, when built, may pay nothing towards them. The state, in detail, by its corporations, was fast plunging into indebtedness, which had already reached an aggregate or several millions, when the process was arrested by a decision of the state supreme court that the act under which the voting had taken place was unconstitutional. The decision was a bitter disappointment to many, and the public clamor for a time was loud and earnest; but a movement to obtain an amendment to the constitution which would permit such municipal aid to railroads was unsuccessful, and the excitement soon died out. The people had taken the 'sober second thought,' and had become convinced that muincipal corporations, in their power to contract debts or to expend public moneys, should be confined closely to proper municipal purposes. And this conclusion may be taken as a third conspicuous landmark in the history of internal improvements in Michigan."

The cases referred to by JUSTICE COOLEY were People *v.* Board of Salem Tp., 20 Mich. 487; People *v.* State Treasurer, 23 Mich. 499; and Thomas *v.* City of Port Huron, 27 Mich. 320. We think it may fairly be said of the case of People *v.* Board of Salem Tp. that the opinion was rendered upon the ground that the tax proposed would be levied for a private rather than a public purpose. This, however, cannot be said of the case of People *v.* State Treasurer. In the last-named case it is held the construction of the railroad was an internal improvement, within the meaning of the constitution, and that what the state could not do, it could not authorize the townships and cities to do. The language of the opinion is not susceptible of any other construction. It is very clear from what has been quoted from the history of Michigan, written by JUDGE COOLEY, and published in 1885, that he so construed the declsions cited. The language of the opinion is as follows: "Our state had once before a bit of experience of the evils of the government connecting itself with works of internal improvement. In a time of inflation and imagined prosperity the state had con-

tracted a large debt for the construction of a system of railroads, and the people were oppressed with heavy taxation in consequence. Moreover, for a portion of this debt they had not received what they bargained for, and they did not recognize their legal or moral obligation to pay it. The good name and fame of the state suffered in consequence. The result of it all was that a settled conviction fastened itself upon the minds of our people that works of internal improvement should be private enterprises, that it was not within the proper province of government to connect itself with their construction or management, and that an imperative state policy demanded that no more burdens should be imposed upon the people by state authority for any such purpose. Under this conviction they incorporated in the constitution of 1850, under the significant title of 'Finance and Taxation,' several provisions expressly prohibiting the state from being a party to or engaged in carrying on, any work of internal improvement, or engaged in carrying on any such work, except in the expenditure of grants made to it, and also from subscribing to, or being interested in, the stock of any company, association, or corporation, or loaning its credit in aid of any person, association, or corporation. Article 14, §§ 7–9. All these provisions were incorporated by the people in the constitution as precautions as against injudicious action by themselves, if in another time of inflation and excitement they should be tempted to incur the like burdensome taxation in order to accomplish public improvements, in case they were not content to wait the result of private enterprise. The people meant to erect such effectual barriers, that, if the temptation should return, the means of inflicting the like injury upon the credit, reputation, and prosperity of the state should not be within the reach of the authorities. They believed these clauses of the constitution accomplished this purpose perfectly, and none of its provisions had more influence in recommending that instrument to the hearty good will of the people." The doc-

trine of these cases was again affirmed in Thomas *v.* City of Port Huron, 27 Mich. 320. These cases all hold that what the state cannot do itself cannot be done through the aid of inferior municipalities.

Internal Improvement through Municipality—Constitutionality of Statute.

Counsel urge that the doctrine announced in People *v.* Board of Salem Tp., People *v.* State Treasurer, and Thomas *v.* City of Port Huron was never accepted as correct by the profession in this state, and is contrary to the decisions of other courts. If we understand the logic of the argument, it is that those cases should be overruled. We have had occasion recently to consider a contention of like character, and supposed we had so clearly expressed ourselves that the doctrine of those cases could no longer be questioned. We do not deem it necessary to repeat what was said upon that subject in Dodge *v.* Circuit Judge (Mich.) 76 N. W. 315.

Counsel suggest it is as competent to authorize the city to own and operate a street railway as to acquire and maintain a public park, waterworks, a lighting plant, or a fire department, or to construct drains or to build sewers. It may be somewhat difficult to draw the line as to what a municipality may properly do and what it may not do, but all the things above mentioned are authorized and defended because it is a proper exercise of the police power. An adequate supply of water is needed for protection against fire. 1 Dill. Mun. Corp. (4th Ed.), §§ 144, 146. There can be no matter of higher public concern to any city than the supply of pure and wholesome water for all useful purposes, and as population becomes more and more compact, and cities grow, the ability of the individual member of the municipal corporation to supply his individual wants in that direction constantly diminishes, and in all the larger places it becomes a matter of absolute public necessity that the city itself should directly or indirectly provide the supply. Nothing so affects the health of the community as the character of its water supply. Prent. Police Powers, 303. Drains and sewers and parks are all needed in the interest of public health. 2 Dill. Mun.

Corp. (4th Ed.) § 598; Kinnie *v.* Bare, 68 Mich. 625, 36 N. W. 672; Prent. Police Power, 56, 131, 242. Lighted streets tend to the prevention of crime. Police powers have their origin in the law of necessity. *Id.* 4. The exercise of these powers has little in common with what is sought to be done here.

It is urged that the internal improvements contemplated by the constitution must be of sufficient magnitude to concern the people of the state (citing Sparrow *v.* Commissioner, 56 Mich. 575, 23 N. W. 315), and that street railways are mere local improvements, or a strictly local interest, not known at the time the constitution was framed, and are not such improvements as are contemplated by the phrase "internal improvements" (citing Detroit Citizens' St. Ry. Co. *v.* City of Detroit, 12 C. C. A. 365, 64 Fed. 646; Railway Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007). It is not claimed these cases are directly in point, but that some statements contained therein lead to the conclusions just stated. The questions involved in this case were not at issue in the cases cited, and the opinions do not tend, in our judgment, to support the contention of counsel. We shall have occasion later to consider whether the improvements are of sufficient magnitude to be deemed internal improvements.

It is said, if the theory of the attorney general is sound, the city of Detroit cannot construct a macadamized road, or pave a street, or build a sewer. It is a complete reply to this suggestion to call attention to the fact that by sections 23 and 38 of article 4, and section 1 of article 11, the constitution has given to townships the control of highways, and to the cities and villages the control of the streets, for all purposes germane to their use.

It is said that while steam railroads are in a sense public highways, in another and legal sense they are not public highways, but that street railways are in every proper sense public highways, public utilities of a local character, and are not internal improvements, within the meaning of our con-

stitution. Our attention is called to the case of Sun Printing & Publishing Ass'n *v.* City of New York (N. Y. App.) 46 N. E. 503, as sustaining this contention. It is true, that case holds that it is within the legislative power to authorize the city to construct a street railway under the streets of New York, and, when constructed, to lease it for not less than 35 nor more than 50 years, at a rental not less than the interest paid by the city for the construction, and 1 per cent. in addition. The writer of the prevailing opinion stated that the case was not free from difficulty, and the court considered the case, "hoping to reach a result that will afford necessary relief to the city and at the same time preserve the general policy of our system of government." It appears in that case that pursuant to the provision of the act the commissioners entered upon their duties, and located a road to be built under the streets, through the main portions of the city, and then tried to induce private capitalists to undertake its construction. No private capitalists were willing to undertake the construction of the road and it was undertaken by the commissioners for the city. In the course of the discussion, reference was made to certain cases decided by the Ohio court, and this language is used: "We do not understand that the views above expressed are in conflict with the Ohio cases. In that state the constitution does not limit municipal expenditures to 'a city purpose.' We do not, however, wish to be understood as approving of those cases, especially in so far as they sustain the right of a city to construct a railroad mainly outside of its own territory and state." In conclusion, the opinion is as follows: "Our government was established by the people for their own protection and welfare. Their policy was to foster and protect individual industry and enterprise. To such policy we owe our advancement as a nation, and to such we must look for our future prosperity. The constitution should be construed with reference to this general policy, and ordinarily railroads should be constructed and operated by private capital. The situation, however, in the city of New York, is most peculiar. A long, narrow island lies

between two rivers,—so narrow in places that there are practically but two or three streets through which the masses must reach its business center. The population of the city during the last half century has increased from three hundred thousand to over a million and a half of people. The travel upon its existing railroads during the last twenty years has increased from one hundred and fifty million in 1874 to upwards of four hundred and forty-eight million in 1894. It was conceded upon the argument that the crowded and congested condition of the travel upon the streets in the city renders the proposed structure necessary. These considerations have induced us to give to the provisions of the act a most liberal construction. The commissioners located the road, and tried to induce private capital to construct and operate it. In this they have failed, and the situation is such that the city must itself construct the road, or go without it. Here we have a demand for a great public highway, which private enterprise and capital will not construct. It is necessary for the welfare of the people, and is required by them. It is public in character, and is authorized by the legislature. Our conclusion is that, under the circumstances and situation here presented, the proposed road may properly be held to be 'for a city purpose,' and that the acts are not in contravention of the provisions of the constitution." The doctrine stated in the Ohio case cited (Walker *v.* City of Cincinnati, 21 Ohio St. 14) is contrary to the holdings of this court, as has already been shown, and cannot be reconciled with the later cases of Taylor *v.* Commissioners, 23 Ohio St. 22; Wyscaver *v.* Atkinson, 37 Ohio St. 80; and Counterman *v.* Dublin Tp., 38 Ohio St. 515. It is evident that the conclusion reached in the prevailing opinion is based upon the ground that because of the crowded condition of the city, and its peculiar shape, the improvement was a necessary one, and that, as private capital and enterprise would not enter upon its construction, it was lawful to authorize the city to do so. None of the conditions existing in New York, justifying the city, if it was justified, in entering upon the construction of

the road, exist in Detroit. The city is already well supplied with means of transit, and, if abuses exist in the management, the authorities have ample power to correct them. The dissenting opinion in this case is more in harmony with the law in this state than is the prevailing opinion.

We are not entirely without light in relation to what constitutes an internal improvement, within the meaning of the constitution. We have already seen that steam railroads come within the category. In the case of Ryerson *v.* Utley, 16 Mich. 270, it was held that an attempt to improve the navigation of the Muskegon river by removing therefrom sand flats came within the constitutional inhibition. In People *v.* Board of Springwells Tp., 25 Mich. 152, it is said that a macadamized road is a work of internal improvement. "The shortness of the road does not change its character. The restriction is not against great works, but against all works of that kind, and the case comes within the language and intent of the prohibition." The court held that work of that character must be done by the local authorities, because, under the constitution, they had been intrusted, as we have already stated, with the care of the highways. In Anderson *v.* Hill, 54 Mich. 477, 20 N. W. 549, it is held that a township cannot be authorized to vote money to aid in deepening or straightening the Dowagiac river, because it is an internal improvement. The court said: "That the straightening or otherwise deepening the channel of Dowagiac river, in Van Buren county, expresses a work of internal improvement, needs no argument. * * * If the legislature has the authority to pass a law permitting the majority of the legal voters of a particular township to impose a tax to aid the state in the work of an internal improvement, it has the authority to impose such by direct enactment, without the intermediate step of a vote of the people, and against their wish; and the rule is well settled, if it has not the power to impose such tax directly, it cannot authorize the imposition of the tax indirectly, through a vote of the municipality or people." In Sparrow *v.* Commissioner, 56 Mich.

567, 23 N. W. 315, it was held that straightening and opening the channel of Cedar river was an internal improvement, though the decision was put upon another ground. JUSTICE CAMPBELL used this language: "There can be no doubt of its being a work of internal improvement. That phrase is as broad as language can make it. It can make no difference for what direct or indirect purpose of public utility an improvement is made, so long as it comes within such a definition, and it can make no legal difference over how much of the state it passes. All works of convenience, whether for travel, drainage, or irrigation, are similar in their nature when small and large, and works for all of these purposes have been made of all dimensions, and for large and small districts. It is impossible to draw any line of magnitude. Any such work that is deemed important enough for the state to construct is within the rule, and, if not built in the permitted way, is within the prohibition." JUSTICE CHAMPLIN agreed with this statement, while JUSTICE COOLEY said he did not intend to question the correctness of the decision in Ryerson *v.* Utley and People *v.* Board of Springwells Tp. In Wilcox *v.* Paddock, 65 Mich. 23, 31 N. W. 609, it is held that the straightening and deepening of Maple river is an internal improvement, within the meaning of the constitution. The constitution of Minnesota has a provision that "the state shall never contract any debts for works of internal improvement or be a party in carrying on such works." A bill was passed providing for a board of railway and warehouse commissioners, who were authorized to erect a state warehouse or elevator at Duluth, for public storage of grain. This was held to come within the constitutional inhibition, and the learned judge enters upon an extended discussion of what constitutes internal improvements, and the authorities relating thereto. It is too long to insert here. This language is used in the opinion: "The time was when the policy was to confine the functions of government to the limits strictly necessary to secure the enjoyment of life, liberty, and property. The old Jeffersonian maxim was that

the country is governed the best which is governed the least. At present the tendency is all the other way, and towards socialism and paternalism in government. This tendency is perhaps to some extent natural, as well as inevitable, as population becomes more complex in its relations. The wisdom of such a policy is not for the courts. The people are supreme, and, if they wish to adopt such a change in the theory of government, it is their right to do so. But in order to do it they must amend the constitution of the state. The present constitution is not framed on any such lines."

When the reasons arose for placing in the constitution the provisions in relation to internal improvements, judged from our standpoint, the railroads were imperfect. Their passengen cars were not much heavier than the large stage coaches, and would carry from 18 to 24 passengers. In many instances the rails were flat bars of iron, less than an inch thick, laid upon rails of wood, and kept in place by spikes. The roadbeds were not well graded or heavily ballasted. The locomotives weighed from two to six or seven tons. Cars were passed over the steeper grades by counterweights of box cars, weighted with stone, which balanced them like window weights balance window sash. As there were no long railways, there was no freighting, except light articles, for any considerable distance. The rolling stock was cheap and scanty. Great weight and great speed would have destroyed the tracks. The entire cost of building what is known as the "Michigan Central Road," to Marshall, was about $2,000,000, and it is probable the value of all internal improvements entered upon by the state was less than $5,000,000. Camp. Hist. Mich. 484. The pleadings show that the various street railway companies own and operate in Detroit 141 miles of street railways, which the defendants propose to take over. If the tracks inside the car barns and abandoned tracks be added, the single-track mileage is about 179 miles. There is a bonded debt upon these roads of upwards of $10,000,000, and their property is regarded as worth between $5,000,000 and $17,000,000. It is currently

reported that the commission propose to pay upwards of $16,000,000 for this property, besides assuming its indebtedness. By virtue of agreements made between these companies, there are run on their lines in Detroit cars owned by other companies, which start from Pontiac, Oakland county; Mt. Clemens, in Macomb county; Ann Arbor, in Washtenaw county; and the city of Wyandotte, in Wayne county. The tracks of these roads are laid in a very substantial manner. The cars of the outside roads will accommodate 50 to 75 passengers each, are of great size, and run at frequent intervals. It is a matter of common knowledge that over some of these lines cars marked "special" are now run at frequent intervals, carrying freight. An electric road is now projected from Ann Arbor to Lansing, and from other of the lines now reaching Detroit to various points in the interior of the state. This method of transit, or some improvement thereon, is yet in its infancy. It does not require one with the ken of a prophet to see that in the near future the villages and cities of the state will be connected with a network of methods of rapid transit. By the terms of the bill (section 5), "the said commission may in their discretion, and upon such terms and conditions as they may deem advisable for the interest of said city, acquire by deed, lease or other satisfactory conveyance from the company or companies holding the same to said city any street railway or railways existing at the time of the passage of this act, and lying wholly within or partly within or partly without said city, operated by the same company or companies, together with the property, assets, routes, privileges, etc., owned and used in connection with or pertaining to said railway, including rights to routes belonging to such company or companies upon which a railway shall be in operation, and may operate and maintain the said street railways so acquired for the carriage of passengers and freight for hire." Another section provides that, after acquiring any railway pursuant to section 5, the "commission shall have the power to enter into agreements with any street railway

company having a line of street railway for or in relation to the exchange of tickets and transfers and for the carriage of passengers, use of tracks or operation of cars," provided such agreement shall not be contrary to the provisions of section 5. It is stated in the briefs of one of the counsel for defendants that during the past year the railways of Detroit carried 45,000,000 of passengers. The state roads of 1850, crude as they were, provided improved methods of moving passengers and freight over what had before been in vogue. The electric roads of 1899 are still greater improvements for the same purpose. The rails used by the electric railway are much heavier and more substantial. The track is much more substantial than those used prior to 1850. The cars will accommodate three or four times as many people. The transit is much more rapid. The entire cost of all the improvements entered upon by the state would not amount to one-half the amount which the record discloses the commissioners expect to pay for the property they intend to take. To say the system of railroads as it existed in 1850 constituted internal improvements, within the meaning of the constitution, and that the system of roads existing in Detroit, which are to be taken over by this commission, and the lines leading thereto, with which said commission is allowed to make agreements for deeds, leases, and in relation to the exchange of tickets and transfers, is not a system of internal improvements, within the meaning of the constitution, is to deny to words in common use their ordinary and accepted meaning. If the legislature may authorize the city of Detroit to enter into the proposed arrangement, it may authorize any other municipality to do so, and, by concert of action, between the various municipalities, they may cover the state with means of rapid transit, owned and operated by the municipalities. This would enable the state to do, by means of agencies called into being by itself, what it cannot itself do, and what the constitution forbids its doing.

It is said that the constitution was adopted a long while ago, and that this is a gigantic age, in which enterprises are

being formed on a scale so vast as to be almost beyond comprehension, and the constitution ought to be given a construction in keeping with the spirit of the age. This argument is more properly addressed to the people than to the courts. Constitutions do not change as public opinion changes. Their provisions do not mean one thing one day and another another day. The written constitution is the most solemn declaration of the people in relation to the powers of state. It was drawn by their representatives selected especially for that purpose. It had their approval at the polls. Every officer of every kind in the state is required to take an oath to support it, before he can enter upon the duties of his office. It is not a pleasant duty to declare that a law passed by the legislature and approved by the governor is not valid. When such a law is enacted, courts cannot for a moment hesitate in performing that duty, disagreeable as it is. The provisions of the constitution involved in this controversy have been in existence for nearly half a century. As we have already shown, they were construed along the lines of this decision nearly 30 years ago. The people of the state have not indicated in the way provided by the organic law any dissatisfaction with these provisions. The courts cannot substitute their judgment of what the constitution ought to be for what the people have made it. Its provisions must remain and control until the people see fit to change them in the way provided by the constitution itself. McPherson *v.* Secretary of State, 92 Mich. 377, 52 N. W. 469.

It is not necessary to discuss the very serious question whether a commission could be authorized to buy from five to eighteen million dollars' worth of property, and subject the city of Detroit to the liability growing out of the operation of upwards of 100 miles of electric street railways, without giving the citizens and taxpayers an opportunity to say whether they wanted to purchase and operate such a business or not, nor is it necessary to discuss the other questions

Same—Same—Street Railways.

raised by counsel; for, if we are right in our conclusion that the law is unconstitutional, this disposes of the case.

We were asked by one of the counsel, in his oral argument, whatever our decision in this case might be, to decide the question whether the city, under any circumstances, may build or buy lines of street railway in its streets, all lying within the city limits, and lease them upon such terms as the city authorities shall deem to be for the best interests of the citizens. It is not necessary to pass upon the question just stated in order to dispose of this case. The law under consideration involves much more than the simple question of municipal ownership of the tracks within the corporate limits, and, in the decision of the case before us, we do not deem it wise to express any opinion upon any question other than the one before us. It will be soon enough to pass upon the other question when it is necessarily before the court, and when the court can have the benefit of the conditions and surroundings then existing.

Mere Question of Municipal Ownership of Street Railways Not Involved.

We think the law unconstitutional, that there is no such office as the "Detroit street railway commission," and that defendants have no title thereto, and that judgment of ouster be entered. The other justices concurred.

HUNGERMAN

v.

CITY OF WHEELING.

(*Supreme Court of Appeals of West Virginia, Nov. 11, 1899.*)

Personal Injuries—Unmanageable Horse—Embankment in Street—Absence of Barrier—Liability of City.*—Where a boy 17 years of age is driving an open buggy along a street, with two companions, younger than himself, behind a horse which has contracted the vicious habit of

*See notes at end of case.

backing, and which, becoming frightened at escaping steam from a locomotive engine, stops and trembles for a moment, and, on being struck with a whip, commences backing, and in spite of whip and words continues to back the buggy some 25 or 26 feet on the surface of the street, and then down a steep bank, by reason of which one of the occupants was injured, if sufficient time elapses between the fright of the horse and the accident to premit the driver, a man of ordinary prudence, to make a proper effort to regain control of the frightened animal, even though he should fail, the city would not be liable for its negligence in failing to maintain a rail or barrier along said embankment, as the injury must be attributed to the viciousness of the horse, rather than the defect of the street.

Whether Streets Must Be Safe for Unmanageable Horses.—It is not the duty of towns to provide streets which shall be safe for runaway or unmanageable horses, or such as have escaped from the control of their drivers without the fault of the town.

(Syllabus by the Court.)

ERROR by defendant to Ohio county circuit court. *Reversed.*

Frank W. Nesbitt, for plaintiff in error.

Howard & Handlan, for defendant in error.

ENGLISH, J. On the 11th of May, 1898, Francis P. Hungerman, an infant, who sued by his next friend, George A. Hungerman, brought an action of trespass on the case against the city of Wheeling, claiming damages to the amount of $5,000. The declaration was demurred to by defendant, the demurrer overruled, and a plea of not guilty was interposed, and issue joined thereon. The case was submitted to a jury, and resulted in a verdict for the plaintiff of $1,000. The defendant moved the court to set aside the verdict and grant a new trial, and also moved in arrest of judgment. These motions were overruled, the defendant excepted, and thereupon judgment was rendered upon said verdict, and the defendant applied for and obtained this writ of error.

Case Stated.

The facts upon which this suit was predicated are as follows: Near the intersection of Wood and Twenty-Eighth streets in the city of Wheeling are two bridges, and between them a depression in the ground. In order that Twenty-

Eighth street might be brought to a uniform grade, a fill has been made between the bridges, the top of which fill at its narrowest point seems to have been 34 feet wide; the surface of the street over this fill being covered with cinder, and a cinder walk for foot passengers ran along each side. At the time the injury complained of occurred, the plaintiff, accompanied by two other boys, about 15 and 17 years of age, respectively, was riding in an open buggy, behind a horse which the testimony shows was in the habit of balking and backing. The horse was driven by the 17 year old boy, and they had just turned into Twenty-Eighth street from Wood street, and gone a short distance along the fill mentioned, when, as the driver testifies, the horse became frightened at the exhaust of an engine, stopped, and, being struck with the whip, began to back, and became uncontrollable. After backing 15 feet, the buggy and horse went over the embankment. This witness says: "I let the horse do as it pleased. I couldn't do anything more, so I tried to talk to the horse, and that didn't do any good. We went over." When asked if the horse had got uncontrollable, he answered, "To my sense, it was." The distance this horse backed is stated differently by different persons. As we have seen, Gould puts the distance at 15 feet; Morrison says 20 to 25 feet; Bridigan says 40 feet. If we average these estimates, it will make 26 feet. In stating that the horse became uncontrollable Gould is confirmed by Morrison, and this witness saw the accident, and tells how it occurred. He says: "I heard the boy holler 'Whoa!' I looked up, and I seen the horse started to back as though he had been frightened by something, and I seen them still keep on backing. Finally the wagon turned,—the horse kind of pulled haw, and turned the wagon, and started for the bank, or on a line with the bank, and I hollered, 'Jump, jump, boys!' " Now, these are the circumstances that immediately surrounded the plaintiff at the time he received the injury complained of.

During the progress of the trial, the defendant, by its coun-

sel, moved the court to give to the jury 14 instructions. Nos. 1, 2, 3, 4, and 5 were given, and the remaining 9 rejected. The defendant excepted to the action of the court in refusing the same. The instructions thus refused read as follows: "(6) You are instructed by the court that if you find that Twenty-Eighth street, at the point where the accident occurred, was defective and dangerous for want of a barrier or rail, and that the horse mentioned in evidence became frightened at a locomotive, and stopped and shivered and backed, and that sufficient time elapsed between the fright of the horse and the accident to permit the driver, being a man of ordinary prudence, to make a proper effort to gain control of the frightened animal, even though he should fail, the injury must be attributed to the viciousness of the horse, rather than to the failure of the city to maintain barriers, and you must find for the defendant city. (7) In order to justify a verdict against the defendant city, it is necessary that it appear from the evidence not only that, by reason of the absence of barriers or guard rails, Twenty-Eighth street, at the point where the accident occurred, was unsafe, but also that it was defective, and out of repair; and, unless this fact is made to appear from the evidence, your verdict must be for the defendant city. (8) The court instructs the jury that under the law of this state, which is binding upon the jury in this case, that when a horse, by reason of fright, disease, balkingness, or viciousness, becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in a highway, or upon a place which is defective for want of a railing, by which the injury is occasioned, the town or city is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. Therefore, in this case, even if you find that Twenty-Eighth street was, at the time of the accident, defective and dangerous for want of a barrier or railing, and that the accident complained of would not have occurred had it not been for the absence of barrier or

rail, yet if you further find that the horse behind which the plaintiff was riding became either frightened or balky, and thus became actually uncontrollable, so that his driver could not stop him, or direct his course, or exercise or regain control over his movements, and in this condition came upon the place where the street was defective for want of a railing or barrier, the city cannot be held liable for the ensuing accident, unless you further find that the accident would have occurred if the horse had not been so uncontrollable. (9) Under the law of this state it is not the duty of the city of Wheeling to provide roads or streets which shall be safe for balking or unmanageable horses, or such as have escaped from the control of their drivers, without the fault of the city. Therefore if you find that the accident complained of in this case occurred under such circumstances, it appearing that otherwise it might not have occurred, you must find for the defendant city. (10) Unless you find from the evidence that the accident complained of in this case would have inevitably occurred by reason of the condition of the highway and the absence of barriers or rails, you must find for the defendant city. (11) Even if you should find that Twenty-Eighth street was defective and dangerous for want of a barrier or rail, and that the horse referred to in evidence became frightened at a locomotive or train of cars, and while so frightened backed over the embankment at the side of Twenty-Eighth street, and that the accident would not have occurred if a barrier had been placed at the side of the street, yet, unless you further find that the accident would have occurred if the locomotive had not so frightened the horse, you must find for the defendant city. (12) Even if you should find that the highway at the point where the accident occurred was defective and dangerous for want of a barrier or guard rail, yet if you further find that the horse mentioned in the evidence was what is known as a balker, and that on the occasion of the accident he balked, and got actually beyond the control of his driver, and thus backed the buggy over the embankment at the side of the

road, your verdict must be for the defendant city, unless you further find that the accident would have occurred if the horse had not so balked and so become uncontrollable. (13) Under the law of this state, which is binding upon the jury in this case, the defendant city is not required to make the traveled part of the street the whole width as laid out, and the defendant is not liable for defects on the part not usually traveled upon which do not affect the safety of the traveled part. Therefore, no matter what defect may be shown to have existed on Twenty-Eighth street at any point outside of the part usually traveled upon by vehicles, you cannot, upon that account, find against the defendant city, unless it appears that such defect affected the safety of the traveled part of the street. (14) If you find that Jay Gould, the driver of the horse mentioned in evidence, was not a man of ordinary prudence, or as prudent as such a man 'would' be, at the time the accident occurred, and that, if a man of ordinary prudence had been driving the horse, and using ordinary care, the accident would probably not have occurred, the accident must be attributed to the lack of prudence on the part of Jay Gould, and you must find for the defendant city."

The court also, at the instance of the plaintiff, gave to the jury three instructions, and to the second and third thus given the defendant objected, and claimed that the court erred in giving instructions Nos. 2 and 3 asked for by plaintiff, which read as follows: "(2) The court instructs the jury that, where a rail or barrier is necessary for the proper security of travelers at places along a public street, which, from their nature, would be otherwise unsafe, and the maintenance of such rail or barrier would have prevented the happening of an injury, it is negligence not to construct and properly maintain such a barrier. Therefore, in this case, taking into consideration the nature and construction of Twenty-Eighth street at the scene of the accident, the declivity extending down from the north side of said street

to the Terminal Railroad tracks beneath, the several lines of railroad beneath said street, and the railroad extending along Wood street and over Twenty-Eighth street at the intersection of said streets, and the two bridges located on Twenty-Eighth street, if you believe that a rail or barrier was necessary to make Twenty-Eighth street at said point reasonably safe for travelers, and that without such rail or barrier said street at said point would be unsafe and dangerous, then an injury sustained by Francis P. Hungerman, proximately caused by the absence of such rail or barrier, is due to the negligence of the city of Wheeling, and the said city is liable in damages therefor. (3) The jury are instructed that, if their verdict be for the plaintiff, they are, in estimating his damages, at liberty to consider the health and condition of the plaintiff before the injury complained of as compared with his present condition in consequence of said injury, and whether said injury is in its nature permanent, and the consequent loss resulting therefrom, and how far said injury is calculated to disable the plaintiff from engaging in mental pursuits or employments in the future, for which, in the absence of said injury, he would have been qualified, and also the physical suffering to which he was subjected or may subjected by reason of said injury, and to allow such damages as, in the opinion of the jury, will be a fair and just compensation for the injury which the plaintiff has sustained; but your verdict must not exceed the sum of $5,000."

Now, without taking up these instructions seriatim, and analyzing them, my conclusion, from the whole case presented by the record, is that the error into which the learned judge was led in ruling upon these instructions arose mainly from a misapprehension of the proximate cause of the plaintiff's injury. The evidence clearly shows that the street was 35 feet wide at the point where the accident occurred, and that this same driver had repeatedly driven along the same without accident, when there was no railing along the embankment, and evidently would have done so on this

Personal Injuries—Unmanageable Horse—Embankment in Street—Absence of Barrier—Liability of City.

occasion but for the fact that the railway engine exhausted its steam, causing the horse to back and become unmanageable. But for the noise made by the escaping steam, no accident would have occurred; and this noise, causing the fright of the horse, taken with the horse's natural disposition to balk and back, was the proximate cause of the accident, and not the want of a guard rail. It is true, a rail might have prevented the accident, but no guard rail would have been necessary if the horse had not become uncontrollable. Counsel for the defendant in error rely on the principles announced by this court in Rohrbough *v.* County Court, 39 W. Va. 474, 20 S. E. 565, but, in my view, the case at bar is easily distinguished from that case. In the Rohrbough Case the accident appears, as stated by the court, to have been an instantaneous occurrence, there being not sufficient time between the fright of the horse and the accident to enable the plaintiff, a man of ordinary prudence, to regain control of his horse. Before the plaintiff could arise to his feet, or do anything to control it, the horse backed over the unprotected wall of the approach to the bridge. In that case this court quoted with approval the case of Titus *v.* Inhabitants of Northbridge, 97 Mass. 266, as follows: "When a horse, by reason of fright, disease, or viciousness, becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes on a defect in the highway, or upon a place which is defective for want of a railing, by which an injury is occasioned, the town is not liable unless it appear that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by the driver." In the case under consideration the horse stops, trembles; the boy applies the whip; he commences backing, and continues for 25 feet, and the driver himself says the horse became uncontrollable. In the Rohrbough Case this court, in its opinion, uses the following language: "From these authorities the proposition is deduced that, if sufficient

79082..

time elapses between the fright of the horse and the accident to permit the driver, being a man of ordinary prudence, to make a proper effort to regain control of the frightened animal, even though he should fail, the county would not be liable for its negligence, as the injury must be attributed to the viciousness of the horse, rather than the defect of the highway. But if no such time intervenes, and the fright and accident are concurrent events, then the county would be liable." In that case it did not appear that any time intervened between the fright of the horse and the accident; the whole matter was an instantaneous occurrence. How different in this case. Here the horse became uncontrollable, and backed the buggy 25 feet to the edge of the embankment and over it. There was no lack of time for a prudent man to regain control of the animal. But for his vicious conduct, which the evidence shows was habitual, and which we must conclude was the proximate cause of the accident, it would not have occurred. In Horton *v.* City of Taunton, reported in a note to Titus *v.* Inhabitants of Northbridge, *supra*, which case was cited with approval by this court in Smith *v.* County Court, 33 W. Va. 713, 11 S. E. 1, the facts were similar to those in the case at bar. A laborer employed by the city had deposited a load of stone within the limits of the highway, and near to, but wholly out of, the traveled portion of it, by the side of a reservoir. The plaintiffs were driving from west to east, and had come within a few feet of these stones, when their horse took fright at them, and suddenly began to back, and continued to back until he reached a point beyond the end of the railing west of the brook, and within the 31 feet where the bank was unprotected; and there he backed himself and the wagon over the bank, and the injuries were sustained for which the action was brought. There was a judgment for the plaintiffs in the court below, which was reversed by the appellate court. In my view of the case, these authorities correctly propound the law which should govern it, and lead me to the conclusion that the circuit court erred in giving

Notes

instructions Nos. 1 and 2 asked for by the plaintiff, so far as it therein told the jury that the failure to keep Twenty-Eighth street in a reasonably safe condition, or to maintain a rail or barrier along said street, was the proximate cause of the plaintiff's injury. This view is also sustained by the case of Jackson *v.* Town of Bellevieu, 30 Wis. 251, where it was held that: "It is not the duty of towns to provide roads which shall be safe for runaway or unmanageable horses, or such as have escaped from control of their drivers without the fault of the town; and where injuries are sustained under such circumstances, it appearing that otherwise they might not have been sustained, the loss must fall upon the owners." See, also, Fogg *v.* Inhabitants of Nahant, 98 Mass. 578. The instructions asked for by the defendant and rejected by the court, in my opinion, were proper, and the court erred in rejecting the same. It is so apparent that the accident and consequent injury to plaintiff in this case was caused by the vicious habit of the horse in balking and backing, of which the driver was not only well aware, but also aware of the condition of this street, over which he had so frequently driven, as well as the proximity of the railroad tracks thereto, that we must consider the conduct of the horse on this occasion, as shown by the evidence, the proximate cause of the plaintiff's injury, and conclude that the court erred in overruling the defendant's motion to set aside the verdict and award a new trial. The judgment complained of is therefore reversed, and a new trial awarded.

Whether Streets Must Be Safe for Unmanageable Horses.

NOTES.

Liability of Municipal Corporation for Injury Resulting from Unmanageable Horse Coming upon Unguarded Defect in Highway.—In the absence of statutory provisions, whether or not a municipal corporation is liable for an injury caused by an unmanageable horse coming upon an unguarded defect in a street or other highway within its limits depends, according to the weight of authority, upon whether the defect or contributory negligence on the part of the person in

Notes

charge of the horse was the proximate cause of the accident, the mere fact that the animal was unmanageable being immaterial in this connection.

Connecticut.—Baldwin *v.* Turnpike Co., 40 Conn. 238; Ward *v.* North Haven, 43 Conn. 148.

Illinois.—Joliet *v.* Verley, 35 Ill. 58; Chicago *v.* Gallagher, 44 Ill. 295; Lacon *v.* Page, 48 Ill. 499; Rockford *v.* Russell, 9 Ill. App. 229.

In an action against a municipality there was evidence that while plaintiff's husband was driving with plaintiff, in a careful manner, a gentle and easily-managed horse, along a street in defendant city, the horse became frightened by a pile of shavings, three or four feet high, on the side of the road, and backed the buggy into a deep, unguarded hole on the opposite side of the street, precipitating plaintiff therein. *Held*, that a finding for plaintiff should not be disturbed. City of Fandalia *v.* Huss, 41 Ill. App. 517.

Indiana.—In Crawfordsville *v.* Smith, 79 Ind. 308, 41 Am. Rep. 612, it was held that where a carefully driven horse becomes frightened, runs away, and is killed by falling into a dangerous and unguarded excavation in a city street, the city is liable for his value.

Iowa.—In Manderschild *v.* City of Dubuque, 25 Iowa, 108, 4 Am. Rep. 196, the court said, in delivering the opinion: "It is the duty of the city, not only to keep the street in repair, but to erect barriers and protections to prevent travelers from passing without its limits, but, in its general direction, into dangers and obstructions. The city cannot be permitted to suffer a street to terminate in a kind of a *cul de sac* leading to precipices or pitfalls, whereby the life and property of the traveler is endangered."

But see Moss *v.* City of Burlington, 80 Iowa, 438, 46 Am. Rep. 82, where it appeared that plaintiff's horse, while tied to a post in a street of the defendant city, became frightened, broke loose, and, ran down an unguarded precipice crossing the street, and was killed. *Held*, that defendant was not liable.

In this case the court said, in delivering the opinion: "The material and only question therefor is, whether when a person securely fastens his horse to a post in a street, and the horse breaks the fastening and runs away and is killed, because the city had failed to erect barriers as above stated, there can be a recovery, when, if the horse had been driven over the declivity by his owner, no recovery could be had for the damages sustained. This question must, we think, be answered in the negative; otherwise the recovery must be based on the fact that the horse ran away, and for the time being, was beyond the control of his owner.

"It is evident, we think, that the plaintiff is not entitled to recover simply because the horse had escaped from his control without his

Notes

fault. The city must keep the streets in a reasonably passable condition for travelers, but it is not bound to keep its streets passable for horses which have escaped from the control of their owners. If the plaintiff had been driving the horse at the time it became frightened, it by no means follows that any injury would have occurred. It may be safely assumed, we think, that an intelligent hand would have guided the horse either up or down Market street, or have checked him before the declivity was reached. No adjudicated case to which our attention has been called goes as far as we must in order to sustain the ruling of the circuit court.

"In the case at bar it must be borne in mind that the declivity down which the horses ran was impassable for 'man or beast,' unless it can be said to have been passable for the former by the stairway. It is therefore clear that if the plaintiff had driven down the declivity he would not have exercised ordinary care. This cannot be said as to the bridge in Manderschild *v.* City of Dubuque, 25 Iowa, 108, and s. c., 29 id. 73; s. c., 4 Am. Rep. 196. There is nothing tending to show that the bridge was impassable, and that the plaintiff in the case just cited would have been negligent if he had made the attempt and drove over it."

Maryland.—In an action to recover damages for injuries caused by a defect in a highway, an instruction to the effect that, if the accident was caused by the fright of plaintiff's mules, a verdict must be for the defendant, unless the fright was caused by a defect in the road manifestly calculated to frighten horses of ordinary gentleness, and the defendant was chargeable with notice of the defect, and failed to use ordinary care and diligence to repair it, is erroneous in declaring that the plaintiff is not entitled to recover under any circumstances unless the fright of the mules was caused by failure of duty on part of the defendant. The plaintiff would be entitled to recover although his own negligence remotely contributed to the accident, provided the road was in disrepair through the defendant's negligence, and the consequences of the plaintiff's negligence could have been avoided if the road had been in good repair. Kennedy *v.* County Commissioners of Cecil County, 69 Md. 65.

Michigan.—Keyes *v.* Marcellus, 50 Mich. 439.

Minnesota.—In Campbell *v.* Stillwater, 32 Minn. 308, 6 Am. & Eng. Corp. Cas. 62, 50 Am. Rep. 567, it was held that where a horse is frightened by an object in the street for which the city is not responsible and runs away, and the driver is injured by a collision with a dangerous obstruction in the street, the obstruction is the proximate cause. In this case the court said in delivering the opinion where several concurring acts or conditions of things—one of them, the wrongful act or the omission of the defendant—produce the injury;

Notes

and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury, if the injury be one which might reasonably be anticipated as a natural consequence of the act or omission." But in Farras *v.* Winona, 71 Minn. 22, 73 N. W. Rep. 505, it was held that the failure of a city to place a fence or railing along a highway is not such negligence as will render it liable in damages sustained by one whose horse, without apparent cause, backed the wagon off an embankment 7 feet high whereby plaintiff was injured, when the road is through the outskirts of the city, and extends, in the shape of an embankment, 2650 feet through an uninhabited low tract, and is of good width and well kept.

In Hull *v.* City of Kansas, 54 Mo. 598, 14 Am. Rep. 487, the action was to recover damages for an injury to a horse and buggy, alleged to have been occasioned by a hole in a street, negligently left uncovered by the city authorities. It appeared that the driver of the buggy, when attempting to turn from one street into another, got one of the lines entangled under the horse's tail, which caused the horse to commence backing, and as the driver was about to jump out, the horse fell into this hole in the embankment on which the street was built. *Held*, that the city was liable. But see Brown *v.* Mayor, 57 Mo. 156.

New Hampshire.—Norris *v.* Litchfield, 35 N. H. 276; Merrill *v.* Claremont, 58 N. H. 468; Winship *v.* Enfield, 42 N. H. 197; Allen *v.* Hancock, 16 N. H. 230; Clark *v.* Barrington, 41 N. H. 44.

New York.—Kennedy *v.* New York, 73 N. Y. 365; Township of Newlin *v.* Davis, 77 N. Y. 317; Radway *v.* Briggs, 37 N. Y. 256; Lower Macungie Tp. *v.* Merkhoffer, 71 N. Y. 276; Ring *v.* City of Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Clark *v.* Union Ferry Co., 35 N. Y. 485. In Akers *v.* New York, 35 N. Y. Supp. 1099, 70 N. Y. S. R. 696, it was held that where a city had negligently failed to place barriers or railings round an excavation, it was liable for the death of a horse caused by its fall into such excavation, although the accident would not have occurred had the animal not been restive.

Pennsylvania.—In Burrell Tp. *v.* Uncapher, 117 Pa. St. 353, a horse and wagon were being driven down a hillside road. At the right side of the road coming down the grade was a steep declivity, unguarded by barriers. Arriving at a point near the foot of the hill, the horse suddenly took fright at a steam thresher standing at the road-side, and sprung to the right, partly over the declivity. Becoming altogether unmanageable he made a second plunge, and went over the precipice, upturning the wagon, and injuring the persons therein. The opinion of the court in that case was delivered by GREEN, J., who said: "The immediately producing cause of the

Notes

accident, in the present case, was the inguarded condition of the road-side at the place where the accident occurred. If that unguarded condition of the road-side was an act of negligence on the part of the defendant, it follows that the defendant is responsible. Whether it was negligence in the defendant to maintain the road at the place in question, without some kind of protection, was a questions, of pure fact, which it was the province of the jury alone to determine," etc.

In Newlin Tp. *v.* Merkhoffer, 21 P. F. S. (Penn.), it was held that, where a horse frightened and backed off a bridge, the township was responsible for the loss resulting therefrom, because of the neglect of the supervisors in not providing side railings, by which, notwithstanding the fright of the horse, the accident might have been prevented.

In Hey *v.* Philadelphia, 81 Penn. St. 44, 22 Am. Rep. 733, it appeared that "the plaintiff was returning to the city from a drive in the East Park. A turn in the road brought him to the margin of the Schuylkill, and in full view of the bridge of the connecting railway. He had the stream on one side, and a high bank of rock or earth on the other. The road was wide and level, but there was a sharp declivity toward the river, with no guard or protection except a sidewalk raised some six inches above the road. A train was passing over the bridge, and the plaintiff's horse took fright. He got out, took the animal by the head and turned it toward the bank. The horse continuing restive, the plaintiff got on a rock to obtain a better hold, but lost his footing and fell between the fore feet of the horse. The animal, freed from all restraint, turned short round, overset the wagon, sprang across the sidewalk into the river, and was drowned. The plaintiff contended that the city was guilty of negligence in not erecting a guard between the road and the stream, and that the accident was attributable to that cause. The question was left as one of fact to the jury, and the law reserved for the consideration of the court." *Held*, that the city was liable.

In Plymouth Tp. *v.* Graver, 125 Pa. St. 24, 25 Am. & Eng. Corp. Cas. 101; it was held that where plaintiff's horse was frightened at a train, and, becoming uncontrollable, ran upon an unfenced railroad track adjoining the street and was killed by a car, it is for the jury to say whether the township supervisors were negligent in failing to erect a fence and to provide reasonable protection against such accidents. Town of Plymouth *v.* Graver, Pennsylvania Supreme Court, March 25, 1899, 25 Am. & Eng. Corp. Cas. 101.

But it was held in Bishop *v.* Township of Schuylkill (Pa.), 7 Cent. Rep. 160 that while a township is required to construct and maintain its public roads in such a manner as to make them safe for usual and ordinary travel, yet it is not chargeable with damages

Notes

resulting from extraordinary accidents which may happen on them, and which reasonable skill and care would not be required to guard against. Thus, the running away of a horse is not a contingency against which the township is bound to provide. And where a public road ends in a steep declivity on another road, long discontinued, without any barrier at the top of the slope, and a horse, driven along the former one, runs away, through no fault of the township, plunges down the declivity, and is killed, it is not error for the court to allow the jury to determine whether there was any duty imposed upon the township in its relations to the traveling public, to erect such a barrier.

In an action to recover damages for injuries caused by a defective highway, where the evidence tends to prove that plaintiff's horse was harnessed with a collar too small for it, which choked it, rendering it uncontrollable, and that, in its blind violence; it plunged down an embankment, the plaintiff cannot recover if the accident was caused by the uncontrollable struggle of the horse, or from that cause concurring with a defect in the highway. Chartier's Township *v.* Phillips, Pa. Sup. Ct., October 29, 1888.

Vermont.—Hunt *v.* Pownal, 9 Vt. 411; Kelsey *v.* Glover, 15 Vt. 708.

In Hodge *v.* Town of Bennington, 43 Vt. 450, it was said: "There has been a long and unbroken line of decisions in this state, that 'if the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road, conspiring with some accidental clause, the defendants are liable.'"

Canada.—Sherwood *v.* Hamilton, 37 Up. Can. Q. B. 410.

Contrary View.—In some jurisdictions, however, it is held that where a horse takes fright at some object for which the municipality is not responsible and runs away or gets beyond control, and the vehicle is injured in consequence of a defect in the street, the municipality is not liable, as the defect is not the sole producing cause of the accident.

Maine.—Moulton *v.* Sandford, 51 Me. 127; Perkins *v.* Fayette, 68 Me. 152.

In Spaulding *v.* Winslow, 74 Me. 533, it appeared that the plaintiff was traveling with horse and wagon upon a road in the town of Winslow, when his horse took fright at a hole, or at the fresh covering of a hole, in a culvert crossing the road, and by the conduct of the horse the wagon was carried into the ditch, the plaintiff was thrown therefrom, and thereby received a personal injury. The plaintiff alleged that the road was defective for not having a railing between the traveled way and the ditch adjoining. In delivering the opinion, the court said: "A question arises, whether the fright of the horse should be considered the legal cause or any part of the

Notes

legal cause of the accident. It is admitted that the hole, or temporary repairing of the hole, had not existed twenty-four hours before the accident happened. Inasmuch as the town would not be liable, as the law then stood, for an injury caused by a defect of which the municipal officers of the town had not twenty-four hours' actual notice, it is contended by the defendants, that if the hole in the culvert had any force or influence in causing the injury, the plaintiff cannot recover.

"Suppose, in the case at bar, the horse had not been affrighted, but the driver, using due care, had, under some misjudgment or miscalculation in driving by the hole, or in passing another team at the place of the hole, caused his team to be upset at the side of the road, where there should have been a railing, and such an accident would not have occurred but for the hole in the culvert. We think in that case the hole in the culvert could not be considered as the real and legal cause of the accident. Everything which induces or influences an accident does not necessarily and legally cause it. In the case supposed, the unrepaired or improperly repaired culvert would have an accidental and casual but not a causal connection with the accident. It might be the 'agency,' or 'medium,' or 'opportunity,' or 'occasion,' or 'situation,' or 'condition,' as it is variously styled, through or by which the accident happened; but no part of its real and controlling cause. It would be the remote, but not the proximate cause. O'Brien *v.* McGlinchy, 68 Me. 557.

"Here then must be the proper distinction. If the hole, or the horse's fright at the hole, was the proximate cause of the injury, the plaintiff cannot recover. If it by chance became merely an agency through which another defect operated to produce the injury, then he can recover.

"Now whether the fright of the horse at the hole shall be regarded as the true and real cause of the accident, or only a circumstance which permitted it to happen, must depend upon the extent of the misconduct of the horse. If the horse became by fright unmanageable, substantially freeing himself from the control of the driver, and the upset ensued from such unmanageableness, then the fright of the horse should be regarded as a proximate cause, or one of the proximate causes, of the accident. The legal condition of the case would be essentially or precisely the same as existed in the cases cited. Moulton *v.* Sandford, 51 Me. 127; Perkins *v.* Fayette, 68 Me. 152, 28 Am. Rep. 84. There were two causes in those cases to produce the accident, for one of which the town was not legally responsible. So in the case at bar, under the conditions assumed, two proximate causes would exist, or if only one existed, then the fright of the horse would be the sole cause of the accident.

Notes

"If however the horse, while being properly driven, upon sight of the hole suddenly started or shied, and swerved or sheered a few feet from the direct line of travel, and through only a momentary loss of control by the driver, threw the wagon into the ditch on account of the want of a railing, and the road was defective for want of a railing, in such case the misadventure of the horse should not be considered as causing the accident. Every irregularity in the movement of a horse is not imputable to some fault or vice. Perfection of conduct is not to be expected. We think it was correctly said by CHAPMAN, J., in Titus *v.* Northbridge, 97 Mass. 266, that 'a horse is not to be considered as uncontrollable that merely shies or starts, or is momentarily not controlled by the driver.'

"It is not a fault in a horse to be spirited, or to start up quickly, or to shy and sheer from objects to a certain extent. Such things are very common occurrences, and are to be looked for and expected in the use of horses, and cannot be prevented or effectually guarded against by the owners or drivers of horses. It is not unreasonable to drive horses of such description upon our public roads. Therefore it would not be reasonable to say that the fright of the horse, under such circumstances and conditions as we are now assuming hypothetically to be true, was a proximate cause of the plaintiff's injury. There can be no fixed rule defining proximate cause. Much must depend upon the circumstances of each particular case. Page *v.* Bucksport, 64 Me. 53, 18 Am. Rep. 239.

"And much depends upon the common sense of the thing. Willey *v.* Belfast, 61 Me. 575.

"It is not an easy thing to establish a general rule as to what may be considered unmanageableness of horses, and much depends upon the circumstances of each case that arises. The distinctions which we make in this case are well established by the cases in Massachusetts and elsewhere. Titus *v.* Northbridge, *supra*; Stone *v.* Hubbardston, 100 Mass. 49; Cushing *v.* Bedford, 125 Mass. 526; Wright *v.* Templeton, 132 Mass. 49; Hey *v.* Philadelphia, 81 Penn. St. 50; Kennedy *v.* New York, 73 N. Y. 365, 29 Am. Rep. 169; Nichols *v.* Brunswick, 3 Cliff. 81, 2 Thomp. Neg. 1207, and cases in *note*."

Massachusetts.—Davis *v.* Dudley, 4 Allen (Mass.), 557; Palmer *v.* Andover, 2 Cush. (Mass.) 600; Fogg *v.* Nahant, 98 Mass. 578, 106 Mass. 278, where plaintiff's horse, while being driven along a private way and when about 166 feet from a highway, became unmanageable and ran away, crossing the highway at right angles and going over an embankment on the farther side, throwing out plaintiff and injuring him, the city is not liable on the ground that it should have provided a railing along the side of the highway, the uncontrollable condition of the horse having contributed directly to the accident,

Notes

and that condition having arisen outside of the limits of the highway and at a distance from the place of the alleged defect. Higgins *v.* City of Boston, Mass. Sup. Jud. Ct., February 27, 1899, citing Titus *v.* Inhabitants of Northbridge, 97 Mass. 258; Fogg *v.* Nahant, 98 Mass. 578, 106 Mass. 278; Adams *v.* Inhabitants of Natick, 13 Allen (Mass.), 429; Richards *v.* Inhabitants of Enfied, 13 Grey (Mass.) 344.

Wisconsin.—Jackson *v.* Belleview, 30 Wis. 250.

Momentary Loss of Control.—A city is liable for an injury resulting from the sudden backing of a well-broken horse over a perpendicular bank more than 4 feet high, into a pond of water, at a place where there was no railing, and where the beaten track was only 18 inches from the edge of the bank, although the horse was momentarily frightened by a load which it met on the passway. Morsman *v.* Rockland, 39 Atl. 995, 91 Me. 264.

Plaintiff's horse, which he was driving along a highway in the defendant town, became frightened, and ran against, and partly over, a wall on the side of the way, which plaintiff contended was of insufficient height. In an action against the town for the injuries sustained, it was held that if the injury was received because the wall was not high enough, and the want of height made it insufficient as a barrier or railing, the plaintiff could recover, if the horse was a reasonably safe horse to drive, and if the plaintiff was in the exercise of due care, and did not lose control of the horse, or lost control for a moment only, and either regained the control, or would have regained it before the horse would have run against the wall, if it had been of sufficient height. Hinckley *v.* Inhabitants of Somerset (Mass.), 18 Am. & Eng. Corp. Cas. 294. And this rule was sustained in Tisdale *v.* Bridgewater, 45 N. E. Rep. 730, 167 Mass. 248; Wright *v.* Templeton, 132 Mass. 50; Bemis *v.* Arlington, 114 Mass. 508.

When a horse, by reason of fright, disease, or viciousness, becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, or upon a place which is defective for want of a railing, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by his driver. Titus *v.* Inhabitants of Northbridge, 97 Mass. 258, 93 Am. Dec. 91. This case was followed in Babson *v.* Inhabitants of Rockport, 101 Mass. 98; Horton *v.* City of Taunton, 97 Mass. 267; Stone *v.* Inhabitants of Hubbardston, 100 Mass. 55; Fogg *v.* Nahant, 106 Mass. 280, 98 Mass. 581; City of Greencastle *v.* Martin, 74 Ind. 458; Houfe *v.* Town of Fulton, 29 Wis. 306.

City of Chicago *v.* Williams

In Houfe *v.* Town of Fulton, 29 Wis. 296, 9 Am. Rep. 568, the evidence was, that the bridge, a wooden structure about fourteen feet wide and ten rods in length over Rock river, without barriers at its sides and with considerable ascent toward the center from either direction, was bare of snow or ice, and that the plaintiff and the man with him, who were traveling in a cutter with a single horse, were passing over it, having reached about the center, the horse drawing the cutter with them in it, when the horse suddenly stopped, and, sitting back in harness, staggered and fell sidewise, and went almost instantly headlong over the side of the bridge, taking the plaintiff with her in the descent to the ice below. The evidence in other respects showed no want of ordinary care or prudence on part of the plaintiff, or of the person with whom he was riding. *Held*, that plaintiff should not have been nonsuited.

And in Olson *v.* City of Chippewa Falls (Wis., 1888), 20 Am. & Eng. Corp. Cas. 300, the court, in delivering the opinion, said: "That where the horse (or horses) suddenly and merely shies, or starts, or backs, or goes sideways, and is momentarily not controlled or uncontrollable, and goes over a bridge or embankment negligently remaining without a reasonable guard or barrier, and the driver does his best to prevent it, and the horses are usually steady and kind, and not more liable to sudden starts or fright than common horses, the driver, if injured by such defect, may recover."

CITY OF CHICAGO

v.

WILLIAMS.

(*Supreme Court of Illinois, Oct. 19, 1899.*)

Action for Torts of Policemen—Defense Expenses—Liability of City.—A municipal corporation is not responsible for the conduct of a police officer in discharging public police duties, and, therefore, it is not liable for expenses incurred in defending police officers in a suit against them for wrongful arrest and detention, and it is not the duty of the corporation counsel, or of any of his assistants, to defend such a suit at the expense of the municipality.

Ultra Vires Contracts—Authority of Municipal Officers.—A contract by municipal officers to pay out public funds for an object *ultra vires* the municipality is null and void.

City of Chicago *v.* Williams

APPEAL by defendant from First district appellate court. *Reversed.*

Case Stated.

This is an action *in assumpsit*, brought by the appellee against the appellant to recover the sum of $677.30, alleged to be due him upon an oral contract with the city, made in 1897, to do stenographic and typewriting work to that amount in a certain action tried in the superior court of Cook county, brought by one Ella C. Quinlan against John J. Badenoch and John E. Fitzpatrick, which work is alleged to have been done under said agreement. The declaration contains the common counts only. The bill of particulars recites that the claim upon which the present suit is brought is for services rendered to the city of Chicago by the appellee as court stenographer in a cause entitled "Quinlan *v.* Badenoch," tried in 1897, "the said Badenoch being at one time chief of police of the city of Chicago, and the plaintiff therein having been employed in behalf of the city through the office of the corporation counsel of said city of Chicago." At the close of the plaintiff's evidence in the case, the defendant, the city of Chicago, made a written motion to exclude from the jury all evidence on the part of the plaintiff, and to give to the jury the following written instruction: "The court instructs the jury to find the verdict for the defendant." The court refused to so instruct the jury, and marked the word "Refused" on the instruction, to which the defendant excepted. The defendant, by its counsel, then offered in evidence the court files in said case of Quinlan against Badenoch, which were admitted in evidence. The defendant then again asked the court to give the jury the following written instruction, to wit: "The jury are instructed by the court to find a verdict for the defendant." The court refused to give such instruction, and marked the same "Refused," to which the defendant excepted. Thereupon the jury rendered a verdict in favor of the appellee, the plaintiff below, for the above amount. Motion for a new trial was overruled, and judgment was rendered upon the verdict. An appeal was taken from

City of Chicago *v.* Williams

this judgment to the appellate court, where the same has been affirmed. The appellate court has granted a certificate of importance.

Charles S. Thornton, Corp. Counsel, and *Thomas J. Sutherland*, for appellant.
Judd & Hawley, for appellee.

MAGRUDER, J. (after stating the facts). 1. The first consideration presented by the record relates to the character of the suit in which the services are alleged to have been rendered. The suit was brought by Ella C. Quinlan against John J. Badenoch and John E. Fitzpatrick to recover damages for false imprisonment. John J. Badenoch was superintendent of police in the city of Chicago in 1895, and John E. Fitzpatrick was a police officer in that city at that time. These officers caused the arrest and forcible detention of Ella C. Quinlan, because they suspected her of complicity in certain crimes. She thereupon brought suit, claiming damages against them personally because of her arrest and detention. Badenoch and Fitzpatrick were defended in that suit by an attorney occupying the position of assistant corporation counsel to the city of Chicago, and by another attorney not connected with the law department of the city. Appellee claims that he acted as stenographer on behalf of Badenoch and Fitzpatrick in the trial of that case, and that he performed services therein as such stenographer to the amount in value of the claim here sued upon. Appellee contends that he did the work for the city of Chicago, and that the city is liable to him for fees charged by him for his work as stenographer. He also claims that the city made a contract with him to do this work for it, or, in other words, that he was "employed in behalf of the city through the office of the corporation counsel of said city." It is to be noted that the suit brought by Quinlan was not brought against the city of Chicago, but was brought against two of the city's police officers, who had improperly and wrongfully made an arrest. The city was not liable to Ella C. Quinlan

because of the arrest so made by two of its police officers. If the charge against them of making an illegal arrest was true, they alone were liable as individuals. Police officers are not agents or servants of the city appointing them, within the rule making the corporation answerable for their acts, nor is a municipal corporation liable for the nonfeasance or misfeasance of the officers of its police. There is an implied or common-law liability for the negligence of municipal officers in the performance of corporate acts which have relation to the management of the corporate or private concerns of the municipality from which it derives special or immediate profit or advantage as a corporation. But where acts are done by the officers of towns and cities in their public capacity in the discharge of duties imposed by the law for the public benefit, and for the promotion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred. In President, etc., *v.* Schroeder, 58 Ill. 353, where a party was charged before a justice of the peace with the violation of a town ordinance by committing an assault and battery, and was arrested therefor, and confined in the town prison, it was held that a municipal corporation is not liable for the illegal and unauthorized acts of its officers in administering an ordinance; and that, although trustees and other officers of the town may, by the illegal and unwarranted exercise of power, render themselves individually liable, the town is not thereby rendered liable. In Wilcox *v.* City of Chicago, 107 Ill. 334, where suit was brought to recover damages for an injury sustained through the alleged neglect of a driver of a hook and ladder wagon belonging to the city fire department, while such driver was engaged in the service of the city in saving property from destruction by fire, it was held that the members of the fire department, although appointed by the city corporation, are not servants and agents of the city, for whose conduct the city is liable, but that they act rather as officers of the city charged with a public service, for whose

Action for Torts of Policemen—Defense Expenses—Liability of City.

negligence in the discharge of official duty no action lies against the city, unless it is expressly given, and that the maxim *respondeat superior* has no application to such a case. In Culver *v.* City of Streator, 130 Ill. 238, 22 N. E. 810, where a person had received a personal injury from one of the officers, of an incorporated city, who, while enforcing an ordinance of the city which prohibited the running at large of unlicensed and unmuzzled dogs, attempted to kill a dog, and, through negligence, shot and wounded such person, it was held that the city's officers appointed or employed by the city are not its agents or servants, so as to render the city responsible for their unlawful or negligent acts in the discharge of their duties. In the latter case it was said that the city is not liable for assault and battery committed by its police officers, though done in an attempt to enforce an ordinance of the city, nor for illegal and oppressive acts of officers committed in the administration of an ordinance, nor for an arrest made by them which is illegal for want of a warrant. In Craig *v.* City of Charleston, 180 Ill. 154, 54 N. E. 184, where an officer had been appointed by the city to keep a street free from obstructions, and, while in charge of the street, had made an unjustifiable assault upon plaintiff, resulting in serious injury to the latter, it was held that in such a case the city is not liable for injuries received; and we there said that a "municipal corporation, while simply exercising its police powers, is not responsible for acts of its officers in violation of the laws of the state and in excess of the legal powers of the city." In the performance of its police regulations a city cannot commit a wrong through its officers in such a way as to render it liable for their torts. Where the city is simply exercising its police powers, acts of its officers or agents, which are illegal and unlawful, are *ultra vires*, and a citizen has no remedy against the corporation for damages caused by such acts of its officers. Blake *v.* City of Pontiac, 49 Ill. App. 543; Arms *v.* City of Knoxville, 32 Ill. App. 604. It follows from what has been said that the city of Chicago was not in any way liable in the suit brought by Ella C. Quinlan against Badenoch and

Fitzpatrick. As the city was not liable, and was not a party to the suit, it was not the duty of the corporation counsel, or of any of his assistants, to defend that suit at the expense of the city.

2. Any contract made by an assistant corporation counsel with a stenographer, authorizing the latter to perform services for the city in a suit to which the city is not a party, and in which the city can, under no circumstances, be held liable, is an invalid contract, and cannot be enforced. This must necessarily be so upon principle and upon authority. The city of Chicago would have no power to make an appropriation of the public funds to pay the expenses of defending such a suit as that which was brought by Quinlan against Badenoch and Fitzpatrick. The second paragraph of section 1 of article 5 of the city and village act, which is the charter of the city of Chicago, gives to the city power "to appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation." To appropriate money for the defense of a suit for damages brought against a police officer because of an illegal arrest made by him is not to appropriate money for a corporate purpose. Such an appropriation of money would not be providing for the payment of the debts and expenses of the corporation; and, if money could not be appropriated by an ordinance for the payment of the expenses of defending such a suit, a contract could not be made with a stenographer, or other person, by any officer of the city, making the city liable to pay money therefor.

Ultra Vires Contracts—Authority of Municipal Officers.

Counsel for appellee introduced in evidence upon the trial below an ordinance of the city, which provides that the corporation counsel "shall superintend, with the assistance of the city attorney, and prosecuting attorney, the conduct of all the law business of the city." This ordinance did not give the corporation counsel, or any one of his assistants, power to superintend the conduct of a lawsuit brought against two of its police officers for the illegal conduct of the latter,

because such lawsuit was not in any sense a part of the law business of the city. The subject of a contract made by or on behalf of the city must relate to a matter about which the municipality can lawfully contract. The city cannot lawfully contract in reference to stenographic work done, not for the city, but for officers of the city individually liable for their own torts. A city can only bind itself by such contracts as it is authorized by its charter to make, and all persons dealing with it must see that the municipal body has power to perform the proposed act. City of Danville *v.* Danville Water Co., 178 Ill. 299, 53 N. E. 118. "Public corporations may, by their officers and properly authorized agents, make contracts, the same as individuals and other corporations, in matters that appertain to the corporation." 1 Dill. Mun. Corp. (4th Ed.) § 445. The matters involved in the contract here in controversy do not necessarily appertain to the municipality, or any of its interests. The municipal corporation is a trustee for the public, and its funds cannot be used for the payment of claims which are not authorized by law or statute, even though such claims may represent work honestly done. Their payment establishes precedents which open the door to fraud. Commissioners *v.* Kincade, 64 Ill. App. 113.

Counsel for appellee also introduced in evidence upon the trial below one of the items of the annual appropriation bill for 1897, passed by the city council on March 18, 1897,—the year during which the trial of the Quinlan case took place. The item was for the contingent legal expenses of the law department, and read as follows: "For the city attorney's office, $20,000.00; for the corporation counsel's office, $15,000.00." It is said that the corporation counsel had a right to employ the appellee to act as stenographer in the Quinlan suit, and to pay him out of the contingent fund thus appropriated for legal expenses. But the appropriation was made for such legal expenses as properly appertained to the performance of the duties of the city attorney and corporation counsel. As has already been stated, it did not fall within

the line of their duties to defend damage suits against the city's officers for illegal torts committed by the latter. In Peck *v.* Spencer, 26 Fla. 23, 7 South. 642, a suit was brought against the acting mayor of a town to test the validity of the latter's election. The town council authorized the acting mayor to employ counsel at the expense of the corporation to defend said suit; and it was held that the corporation's funds could not be applied to the payment of the expenses of such a suit; that all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred; that the town council in that case had not the power, either express or implied, under its charter, to appropriate money in defense of contested elections; that such contests were personal; that the corporation could have no interest in the result, and that an appropriation to pay any one of the parties the expenses he might be put to was without legal authority. In the Florida case the court say: "An ordinance making an appropriation of the funds of a town or city, derived from taxation, for purposes wholly beyond the purview of municipal grant, is a wrongful appropriation of the funds held in trust for the taxpayers and people to pay the alimony and legitimate expenses of the town or city, and is, in short, *ultra vires*, null and void." The doctrine that the appropriation of public funds for a purpose beyond the purview of municipal grant is void necessarily involves the doctrine that a contract by the city or any of its officers to pay out public funds for such purpose is illegal and void. 10 Am. & Eng. Enc. Law, p. 962.

For the reasons above stated, we are of the opinion that the appellee had no right of recovery in this case, and that the court below erred in not instructing the jury to find for the defendant below, the appellant here. Accordingly, the judgments of the appellate court and of the superior court of Cook county are reversed, and the cause is remanded to the latter court, with instructions to proceed in accordance with the views herein expressed. Reversed and remanded.

CITY OF LOUISVILLE

v.

SEIBERT.

(*Court of Appeals of Kentucky, May 31, 1899.*)

Actions against Cities—Limitations.—The statutory provision that an action for injuries to property against a city of the first class cannot be maintained unless brought within six months after the cause of action accrued is unconstitutional.

Same—Same.—The 12-months statute of limitations is not applicable to an action against a city of the first class for injuries to property caused by negligence.

Grading Street—Excavation—Injury to Property—Liability of City.* —A city is liable for rendering abutting property inaccessible for an unreasonable length of time by reason of an excavation in the street, made in grading the same.

APPEAL by defendant from Jefferson county common pleas division circuit court. *Affirmed.*

Henry L. Stone, and *Alex. G. Barrett*, for appellant.

Gardner & Moxley, for appellee.

GUFFY, J. The appellee instituted this action March 28, 1896, in the Jefferson circuit court, against the appellant, the city of Louisville. It is substantially alleged in the petition that on or about the 11th of April, 1895, appellant undertook to, and did, by and through its agents, grade Twentieth street from the north line of Colgan to Maple street, and that said grade was completed on the 11th of April, 1895; that in said grade a deep excavation was made in said street, three or four feet below the natural surface at that point, and, when it rained, water drained into same, and could not escape therefrom, and, since the same was completed, water, to the depth of two or three feet, stood in said excavation from

Case Stated.

*See *notes*, 2 Mun. Corp. Cas. 556 *et seq.*

Colgan to Maple street, rendering said street wholly unfit for travel, and same has since been a cesspool of stagnant water, mud, and filth, and same entirely surrounds plaintiff's premises on Twentieth street, extending from the north side of Colgan street to and beyond the rear of her stable, and by reason of same she has been cut off from the use of Twentieth street, and her stable rendered inaccessible from Twentieth street; that at the time said excavation was made she resided in a flat above the storeroom on her premises, and the storeroom on the first floor was rented to a tenant, who conducted a successful business therein, but because the stable was rendered inaccessible from Twentieth street, and Twentieth street was in such condition that it could not be crossed with convenience or safety, she lost said tenant. The plaintiff further sets out specifically various items of damage and injury to the amount of $5,000. On October 16, 1896, a supplemental petition was filed, showing that the wrongs theretofore set out still continued, and set up additional damages, but did not increase the amount of her demand. The answer may be treated as a denial of the manner of grading, and the results therefrom, and a denial of the damages, as set up by the plaintiff. In an amended answer the defendant pleaded the 6-months statute of limitations in regard to suits against the city of Louisville, and also pleaded the 12-months statute of limitations. The court sustained a demurrer to the pleas of the statute of limitations, which constituted the second and third paragraphs of the amended answer. After the issues were made up, a jury trial resulted in a verdict and judgment in favor of plaintiff for the sum of $500; and, appellant's motion for a new trial having been overruled, it has appealed to this court.

Appellant complains of the admission of incompetent evidence and the rejection of competent evidence. We are, however, of the opinion that no error occurred in respect thereto; nor did the court err in overruling appellant's motion for a peremptory instruction to the jury to find for defendant.

It is insisted for appellant that the court erred in sustaining a demurrer to the second and third paragraphs of the amended answer, in which the statute of limitations was pleaded and relied on. It is insisted for appellee that the 6-months statute relied on by appellant is unconstitutional. We need not discuss that question, as it was fully discussed in City of Louisville *v.* Kuntz, 47 S. W. 592, wherein it was decided by this court that the 6-months statute was unconstitutional. The 12-months statute of limitations has no application to an action of this kind.

Actions against Cities—Limitations.

Same—Same.

It is evident that a city has no right to excavate a street, and leave it an unreasonable length of time in such condition as to inflict upon an owner of abutting property such injuries or damages as are alleged to have been done in this case; and we think the evidence introduced fully sustains the verdict of the jury. The instructions given correctly presented the law applicable to the case on trial. Perceiving no error in this record prejudicial to the substantial rights of the appellant, the judgment is affirmed.

Grading Street—Excavation—Injury to Property—Liability of City.

GAMEWELL FIRE-ALARM TEL. CO.

v.

CITY OF LAPORTE.

(*Circuit Court, D. Indiana, Oct. 4, 1899.*)

Authority of Officers—Notice.*—Any person dealing with the officers of a municipal corporation is bound to take notice of any constitutional limitation on their power to bind the corporation.

Municipal Indebtedness and Resources—Notice.†—Any person dealing with a city is chargeable with notice of whatever its public

*See note at end of case.

†See note at end of case.

Gamewell Fire-Alarm Tel. Co. *v.* City of Laporte

records disclose as to the amount of its indebtedness, and of the records of the county and state as to the value of the taxable property in the city.

Municipal Indebtedness in Excess of Limitation—Equity.—Complainant entered into a contract with the defendant city, under which a fire alarm and police telegraph system were installed therein and accepted by the city, but the contract was void as repugnant to a constitutional limitation on the power of the city to incur indebtedness. *Held*, that a suit in equity against the city for the rental value of the system could not be maintained, whether or not there was a remedy at law.

Same—Same—Property Furnished under Void Contract—Resulting Trusts.—Nor was complainant entitled to have a resulting trust raised in its favor in regard to the plant furnished by it to the city under such agreement, as both parties thereto were *in pari delicto* in violating the constitutional prohibition preventing the city from increasing its indebtedness.

Right to Equitable Relief.—A wrongdoer cannot move a court of equity to do an irreparable injury to help him out of a situation into which he knew he had no right to put himself.

Morris, Newberger & Curtis, for complainant.
W. C. Ransburg and *John H. Bradley*, for defendant.

BAKER, DISTRICT JUDGE. On the 16th day of July, 1890, the complainant entered into a contract in writing with the defendant, agreeing to install a fire alarm and police telegraph system in said city for $3,500, on the condition that the defendant should furnish a suitable room for the central, or battery, station, should secure the right of way through the public streets for the wire circuit, should give the use of all poles then standing that were owned or controlled by the city, and the use of a bell to be furnished by the city for giving alarm. It is alleged in the complaint that, in strict conformity with the specifications and conditions of the contract, the fire alarm system was installed in said city and was accepted by it. The conditions of the contract could not have been conformed to without the city having furnished, for the purpose of installing the plant, the room for the central station, the easement of way through the streets, the use of the poles

Case Stated.

owned by the city, as well as the use of the alarm bell. The complaint sets out a copy of an opinion signed by the then city attorney of Laporte, which plainly discloses that the disability of the city to enter into the contract was within the contemplation of both parties, growing out of the fact that the city was then indebted in excess of 2 per centum of the assessed valuation of the property in said city. It is also alleged that the complainant brought suit in the Laporte circuit court for the purpose of recovering the contract price of the plant, and that, on appeal, it was decided by the supreme court of this state that the contract was void, and that no recovery could be had for the value of the labor and materials furnished in installing the plant, either upon the written contract or upon an implied contract. It is further alleged in the complaint that the defendant has been put to some expense and outlay for repairs, betterments, and additions to said plant and system, the amount of which is not known to the complainant. It is also alleged that the plant is now a going concern, and that the complainant is ready and willing to operate the system for the use and benefit of the city, upon the condition that the city shall pay a reasonable rental for the past use of it, and a like reasonable rental for its future use. It is also alleged that the system is complete and entire, and incapable of dismemberment and disintegration, without destroying the use thereof, and without doing irreparable injury to the several parts composing the same. The prayer of the bill, aside from the prayer for a temporary restraining order, is that an account be taken for the past use of the system by the defendant, and that it be ordered to pay the complainant the amount found due and owing for such use; that it be declared and adjudged that the defendant is, and since the delivery to it of said plant has been, a trustee holding the plant, and every part thereof, and all the easements, franchises, and privileges thereunto appertaining, for the use and benefit of the complainant, subject only to the public burden and duties necessarily incident to the use thereof for public safety and

convenience, and that, unless some arrangement mutually satisfactory to said defendant and complainant be made, the defendant, as such trustee, be required and compelled to make over unto the complainant the possession of said fire-alarm plant, and every part thereof, together with all easements, franchises, and privileges appurtenant thereto, as an entire plant and property; and that the court will forever enjoin and restrain the defendant, and all its officers, agents, attorneys, and employees, from interfering with the complainant, and its officers, agents, and employees, in the management and operation of the said system and plant, after the same shall have been made over to the complainant, and from interfering in any wise with the disposition or use thereof. To this complaint the defendant has interposed a demurrer, and in argument has insisted—First, that the complainant has an adequate remedy at law; and, second, if it has no remedy at law, that it is not entitled to relief on the facts set out in the bill, in a court of equity.

In the view that the court takes of the case, it is not necessary to consider whether the remedy of the complainant, if it is entitled to one, is by an action at law, either for the recovery of the property in specie, or for the conversion of it by the defendant. The constitution of this state provides that:

"No political or municipal corporation in this state shall ever become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding two per centum of the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void." Const. 1851, art. 13.

In the case of City of Laporte *v.* Gamewell Fire-Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, in the supreme court of this state,—a suit between the present complainant and defendant upon the contract set out in the present bill,—it was held that the complainant was required to take notice of the fact that

the defendant was indebted at the time the contract was made beyond the constitutional limit, and therefore that the city had no power to become indebted in any manner or for any purpose; and it was further held that the city had no power to become indebted to the complainant, and that the common council of the city had no power to ratify or validate the same by resolution or otherwise. If the principle so announced by the supreme court in the suit between the parties to the present bill is not binding, the doctrine so announced is thoroughly well settled as the general rule of law. Any person dealing with the officers of a municipal corporation is bound to take notice of any constitutional limitation on their power to bind the corporation. In the present case the complainant is chargeable, not only with notice of the constitutional prohibition, but also chargeable with notice of whatever the public records of the city disclose as to the amount of the city's indebtedness, and notice of the records of the county and state as to the value of the taxable property in the city. So that, when the complainant entered into the contract and installed the plant, it was charged with notice and knowledge that the city had no power to incur the indebtedness in any manner or for any purpose in connection with the plant so installed. As said by the supreme court of the United States in Litchfield *v.* Ballou, 114 U. S., on page 192, 7 Am. & Eng. Corp. Cas. 373, 5 Sup. Ct. 821:

Authority of Officers—Notice.

Municipal Indebtedness and Resources—Notice.

Municipal Indebtedness in Excess of Limitation—Equity.

"The language of the constitution is that no city shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property. It shall not become indebted,—shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose, no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount, in relation to the

sources of payment, as an impassable obstacle to the creation of any further debt in any manner or for any purpose whatever. If this prohibition is worth anything, it is as effectual against an implied as an express promise, and is as binding in a court of chancery as in a court of law."

If the present bill can be maintained for the purpose of making the city pay a rental for the use of the property in the past and in the future, it does create a debt in violation of the prohibition of the constitution. If a suit can be maintained for the recovery of the rental value of property put in possession of the officers of a municipal corporation under the circumstances shown in this case, it would result in evading and defeating the operation of the constitutional prohibition. It would be an easy matter, under the guise of a contract of sale, to install a fire-alarm plant, or other plant, in a city indebted in excess of the constitutional limitation, and, when payment was refused in accordance with the terms of the contract, to sue the municipal corporation as a trustee, and charge it with the rental value of the plant so installed, for its past and future use. Such a construction would be an invitation to unscrupulous parties and faithless public officers to disregard the rights and interests of the taxpayers of the city, and to fasten an endless burden of indebtedness upon them.

But in this case there are other difficulties in the way of maintaining the present bill. The most favorable view that can be taken of the complainant's situation is that it and the defendant are *in pari delicto*. Where both complainant and defendant are in equal wrong, a court of equity will not lend its aid to extricate either from the position of wrong into which it has knowingly and purposely placed itself. As was said by the supreme court of Ohio in the case of Bridge Co. *v.* Campbell, 54 N. E. 372, 376: "In this case, both parties have acted in disregard of the statute, and the court will leave them where they have placed themselves, and refuse to aid either." Perhaps the complainant and defendant in this

Same—Same—Property Furnished under Void Contract—Resulting Trusts.

Note

case are not *participes criminis*, as was said by the supreme court in Litchfield *v.* Ballou, *supra*, in the act of violating the constitutional prohibition, but surely they are *in pari delicto*, and equity will no more raise a resulting trust in favor of the complainant than the law would raise an implied *assumpsit* in favor of a party charged with the violation of a public policy so strongly declared.

Another objection to this assertion of right to the property as a going concern is that the plant is not entirely the property of the complainant. The poles of the city, the easement of way through its streets, the central station, the alarm bell, and certain betterments and additions alleged to have been made to the plant, belong to the city; and it is alleged that the property furnished by the complainant and annexed to the city's property is incapable of separation from it without irreparable injury. Without the poles and the use of the streets, and the other property furnished by, and belonging to, the defendant, the value of the remainder of the plant as a going concern is gone. The court has no rightful power to take from the defendant, either before or after compensation made, the property which belongs to the defendant. The court is clothed with no power to make either a contract for the sale or rent of this property on behalf of the city. In the property so furnished by the defendant it is manifest that the complainant has, and can have, no equity; and, on the complainant's own showing, it cannot separate its property from the defendant's without irreparably injury. A wrongdoer cannot move a court of equity to do an irreparable injury to help him out of a situation into which he knew he had no right to put himself. For these reasons the demurrer to the bill will be sustained.

Right to Equitable Relief.

NOTE.

Limitation of Indebtedness—Notice.—In Gutta Percha, etc., Mfg. Co. *v.* Ogalalla, 40 Neb. 775, 42 Am. St. Rep. 696 the court said: "It is the recognized doctrine that whoever contracts with a municipality must,

Note

at his peril, take notice of the powers conferred by its charter and whether the proposed indebtedness is in excess of the limitations imposed thereby. Hodges *v.* City of Buffalo, 2 Denio, 110; Lowell Five Cents Savings Bank *v.* Winchester, 8 Allen, 109; People *v.* May, 9 Col. 80; Law *v.* People, 87 Ill. 385; French *v.* City of Burlington, 42 Iowa, 614. As said in the case last named, 'any other rule leaves the taxpayer at the mercy of the officers of the city and contractor, and would render the constitutional provision nugatory. Such a result cannot be contemplated or allowed to prevail.' "

In Smith *v.* Broderick, 107 Cal. 644, 48 Am. St. Rep. 167, it was held that those who deal with a municipality are presumed to know the extent of its powers, and must see that any contracts they make with it do not exceed the constitutional limit of indebtedness. Citing San Francisco Gas Co. *v.* Brickwedel, 62 Cal. 641; Sutro *v.* Pettit, 74 Cal. 337, 5 Am. St. Rep. 442; McBean *v.* San Bernardino, 96 Cal. 187; Von Schmidt *v.* Widber, 105 Cal. 151. See also Buchanan *v.* Litchfield, 102 U. S. 278; Schulenburg, etc., Co. *v.* East St. Louis, 63 Ill. App. 214.

Persons dealing with municipal authorities are required to exercise reasonable diligence to ascertain, before attempting to bind the public by obligations outrunning the official life of those boards who are willing to assume them, whether there be legally provided the funds from which the obligations may be met; and in the absence of such diligence the public will not be estopped from setting up the illegality of the obligations by the fact that the other party has acted in reliance upon their validity. Atlantic City Water-Works Co. *v.* Read, 50 N. J. L. 665, 24 Am. & Eng. Corp. Cas. 562.

And so it is the duty of persons dealing with public officers to take notice of their official and fiduciary character, and that they can only bind the public corporation they represent in the manner and to the extent authorized by law. Laporte *v.* Gamewell Fire-Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686; Bloomington School Twp. *v.* National School Furnishing Co., 107 Ind. 43–45, and cases cited; Julian *v.* State, 122 Ind. 68, 73; Honey Creek School Twp. *v.* Barnes, 119 Ind. 213, 217; Union School Twp. *v.* First Nat. Bank, 102 Ind. 464, 470; Mathewson *v.* City of Grand Rapids, 88 Mich. 558, 26 Am. St. Rep. 299; Newberry *v.* Fox, 37 Minn. 141, 5 Am. St. Rep. 830; Sutro *v.* Pettit, 74 Cal. 332, 5 Am. St. Rep. 442; Turvey *v.* Bridgeport, 55 Conn. 412.

TRUSTEES OF PHILLIPS ACADEMY

v.

INHABITANTS OF ANDOVER.

(*Supreme Judicial Court of Massachusetts, Jan. 4, 1900.*)

Educational Institutions—Exemption from Taxation.—Under the statute of Massachusetts exempting from taxation the property of educational corporations occupied by them or their officers for the purposes for which they are incorporated, premises occupied by such officers as homes for themselves and their families, dormitories, dining halls and boarding houses, gymnasiums, and other buildings intended primarily for, and actually devoted to, the use and benefit of students and those attending such an institution for the purpose for which it was incorporated, are all exempt from taxation.

Watering Streets—Special Assessments—Constitutional Law.*—Under the constitution of Massachusetts, the benefit to abutting property from the watering of the street in front of it may warrant a special assessment, provided the assessment does not substantially exceed the value of the benefit; and, therefore, St. 1895 of Massachusetts c. 186, is constitutional.

Same—Same—Exemptions from Taxation.—Such special assessments do not come within exemptions from general taxation.

Same—Same—Compliance with Statute.—A vote appropriating money for street watering contained an express reference to such statute, and stated that the money was appropriated under that act, and did not limit the amount of the assessment. *Held*, that the proper inference was that the whole cost was to be assessed on the estates abutting on the streets watered.

T. H. Russell, for plaintiffs.

Wm. Odlin, for defendants.

MORTON, J. This case was heard on agreed facts, and the principal question is whether the property for which the plaintiffs were assessed was exempt from taxation by virtue of Pub. St. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465, which provides that "the personal property of literary, benevolent, charitable and scientific

Case Stated.

*See notes at end of case.

institutions and temperance societies incorporated within this commonwealth and the real estate belonging to such institutions occupied by them or their officers for the purposes for which they are incorporated" shall be exempt from taxation. There can be no doubt that Phillips Academy is an institution within the meaning of the exempting clause, and that, with perhaps a possible doubt in the case of Prof. Park, the persons occupying the various houses were officers of the institution. Williams College *v.* Assessors of Williamstown, 167 Mass. 505, 46 N. E. 394. The more difficult question is whether the property was occupied by them for the purposes for which the institution was incorporated. It is not easy, and perhaps not possible, to define what will constitute such an occupancy under all circumstances, and we shall not attempt it; but there are some general rules and considerations which we deem it proper to state, notwithstanding the disposition which is made of this case.

The occupancy referred to usually will result from the official connection of the officer with the institution, and commonly will continue only so long as such connection lasts. The legislature could have provided, as it did formerly in the case of Harvard College (in tax act of 1818, and prior and subsequent tax acts), that such occupancy of itself should exempt the estate from taxation, or even that all of the real estate belonging to any of the favored institutions should be exempt. Previous to the adoption of the Revised Statutes this seems to have been the case, with a qualification after a time in regard to Harvard College and Phillips Academy. The exemptions were incorporated each year in the annual tax acts, and the institutions exempted were described by name, except that, beginning with 1801, there was in each act a general provision exempting academies established by the law of this commonwealth. Phillips Academy came under this general provision, but by a proviso in the act of 1821 (chapter 107, § 6) and in succeeding acts it was provided (and this is the qualification referred to above) that nothing

contained in the act should "prevent the town of Andover from taxing such real estate belonging to the corporation of Phillips Academy situate in said town as shall not be under the immediate occupation and improvement of said corporation, or of any person or persons connected with said corporation exempted from taxation by this act." The persons who were exempted from taxation that were connected or likely to be connected with Phillips Academy were ministers of the gospel, preceptors of academies, and Latin grammar school masters. These and other personal exemptions relating to "the president, professors, tutors, librarians and students of Harvard, Williams and Amherst Colleges and of all other theological, medical and literary institutions," were repealed by St. 1828, c. 143. The effect of this repeal, so far as Phillips Academy was concerned, seems to have been to cause the omission in subsequent tax acts from the proviso of the concluding clause, which had provided by implication that real estate belonging to the corporation, and occupied by any person connected with it, should be exempt from taxation. By the Revised Statutes a general rule was established, which described in a single phrase the institutions to be exempted, and limited the exemption to the real estate belonging to them, and "actually occupied by them or by the officers of such institutions for the purposes for which they are incorporated." Rev. St. c. 7, § 5, cl. 2. This statute, with certain additions and amendments not now material, has been continued by successive re-enactments to the present time. It is manifest that under the Revised Statutes and succeeding statutes the mere fact that real estate belonging to an exempted institution was occupied by it or by one of its officers could not be regarded as sufficient, without anything more to exempt the property from taxation, and it has not been so regarded. Pierce *v.* Inhabitants of Cambridge, 2 Cush. 611; Williams College *v.* Assessors of Williamstown, 167 Mass. 505, 46 N. E. 394; Trustees of Amherst College *v.* Assessors of Amherst (Mass.) 53 N. E. 815. In any other view the words "for the purposes for

which they are incorporated" would be unnecessary and meaningless. The omission from subsequent statutes of the word "actually," which was in the Revised Statutes, does not affect the construction. Association *v.* Lynn, 136 Mass. 283, 285. Whatever else, therefore, may be said of the occupancy, it must be for the purposes for which the institution was incorporated, and this renders it necessary to inquire into the nature and character of the occupancy. If they are such that, taking all of the circumstances, and all the legitimate considerations into account, it can be fairly said that the purpose of the occupancy is that for which the institution was incorporated, then the property is exempt; otherwise, not.

The occupancy contemplated by the statute means, we think, something more than that which results from ownership and possession on the part of the institution, or the use of the property for investment purposes. It must have, or be supposed to have, direct reference to the purposes for which the institution was incorporated, and must tend, or be supposed to tend, directly to promote them. In a sense, any occupancy on the part of the institution or its officers may be said to have reference to those purposes, and to promote them. But the language of the statute implies, we think, a direct, or what is supposed to be a direct, connection between the occupation and the purposes for which the institution was incorporated, and not an indirect one. It is not enough, for instance, that an income is derived from the occupancy, which is applied to carrying on the institution. Trustees of Chapel of Good Shepherd *v.* City of Boston, 120 Mass. 212. At the same time the occupancy may be of the sort contemplated by the statute, notwithstanding that, as incident to it, rent is received, or the pecuniary value to the officer occupying it is taken into account in some other manner. Massachusetts General Hospital *v.* Inhabitants of Somerville, 101 Mass. 319. The distinction lies, it seems to us, between an occupancy which is for the private benefit and convenience of the officer, and which is so regarded by the parties, as in the

ordinary case of landlord and tenant, and an occupancy where, although necessarily to some extent the relation of landlord and tenant enters into it, the dominant or principal matter of consideration is the effect of the occupancy in promoting the objects of the institution, and upon the efficiency and influence of the officer as such, and upon those whom the institution is designed to benefit. In the former case the property would not be exempt, and in the latter it would; and the fact that the institution incidentally derived some pecuniary advantage from the occupancy would not deprive the property of the exemption to which it otherwise would be entitled. In considering whether property is occupied so as to be exempt, regard may be had, among other things, to the situation of the institution. If, for instance, it is so situated that desirable residences are not or may not be easily obtainable, and those in charge of it are of opinion that such officers as the best interests of the institution and of those resorting to it require can be more readily obtained if the institution provides places for them to live in, and it does so, this may be taken into account in determining whether the occupancy is for the purposes for which the institution was incorporated. Or, again, if, with the best interests of the institution as an educational institution in view, and for the purpose of enhancing its advantages to students, and of promoting discipline and good conduct, and greater freedom of intercourse between students and professors and instructors, those in charge deem it advisable that the president and professors and others connected with the institution should occupy residences in the college yard or in proximity to the college buildings, this also may be taken into account. The dominant purpose of the occupancy under such or similar circumstances may be as truly that for which the institution was incorporated, as the occupancy of buildings for recitation purposes or for officers or for other like purposes would be. And the occupancy does not lose what may be termed its institutional character and purpose because, as incidental to it, the president and professors and other

officers and their families are provided with homes, for the possession and enjoyment of which by them compensation is allowed or taken into account in some manner. In many if not most New England colleges and academies, the presence of the families of the president and professors and other officers has been and is regarded as advantageous to the students and as beneficial to the institution. The occupation, therefore, by them, as homes, of property belonging to such institutions, would not necessarily be inconsistent with the spirit and intent of the exempting clause. In considering the purpose of the occupancy, due weight is also to be given to the intentions of those in charge of the institution. The institution can only act through agents. In Massachusetts General Hospital *v.* Inhabitants of Somerville, 101 Mass. 319, 322, it is said that: "What lands are reasonably required, and what uses of land will promote the purposes for which the institution was incorporated, must be determined by its officers. * * * In the absence of anything to show abuse, or otherwise to impeach their determination, it is sufficient that the lands are intended for, and in fact appropriated to, those purposes." And again, later: "The presumption is in favor of their judgment, and it requires something more than mere difference of opinion upon a matter of opinion especially confided to them to overcome that presumption." Their conclusions are not final. But, if consistent with other facts tending to show that the purpose of the occupancy is that for which the institution was incorporated, they well may be allowed to have a controlling effect. The question whether, in any given case, the property is or is not exempt, is to be determined by considering all of the facts and circumstances, and the intentions and purposes of those in charge of the institution respecting the use and occupation of the property will or may have a material bearing upon the proper determination of the question.

In applying the principles thus laid down, it is clear that not only may premises used by officers as homes for them-

selves and their families be so occupied by such officers as to be exempt, but also dormitories and dining halls and boarding houses, gymnasiums, and other buildings intended primarily for, and actually devoted to, the use and benefit of students and those attending the institution for the purpose for which it was incorporated. The statute is not to be construed narrowly, but in a fair and liberal sense, and so as to promote that spirit of learning, charity, and benevolence which it has always been one of the fundamental objects of the people of this state to encourage.

Educational Institutions—Exemption from Taxation.

We think that there is nothing in Pierce *v.* Inhabitants of Cambridge, 2 Cush. 611, Williams College *v.* Assessors of Williamstown, *supra*, and Trustees of Amherst College *v.* Assessors of Amherst (Mass.) 53 N. E. 815, necessarily inconsistent with the views expressed above. In Pierce *v.* Inhabitants of Cambridge, the question, as stated in Williams College *v.* Assessors of Williamstown, *supra*, "was whether the real estate was taxable to Pierce as tenant"; and the decision was put on the ground that the facts were such as to create in Prof. Pierce an estate as tenant, for which he was taxable. Perhaps the case might have stood equally well on the ground that the occupation appeared to be rather for the private benefit and convenience of Prof. Pierce than for the purpose for which the college was incorporated. So, in Williams College *v.* Assessors of Williamstown, the occupation was held by a majority of the court to be for private purposes. The case stands on its own facts, and was not supposed by a majority of the court to overrule any prior cases, or to change the law as it had been previously practiced and understood. Trustees of Amherst College *v.* Assessors of Amherst followed the Williamstown Case, and went on the ground that it could not be held, as matter of law,—which was the ruling of the superior court,—that the house was exempt, though it was intimated in the opinion that it could have been found "that the dominant purposes of the president's occupation were not private, but those for which the college was incor-

porated." On the other hand, we think that the conclusions which we have reached are abundantly supported by Trustees of Wesleyan Academy *v.* Inhabitants of Wilbraham, 99 Mass. 599, Massachusetts General Hospital *v.* Inhabitants of Somerville, *supra*, and Mt. Hermon Boys' School *v.* Gill, 145 Mass. 139, 13 N. E. 354, in this state, and State *v.* Ross, 24 N. J. Law, 497, and Yale University *v.* Town of New Haven (Conn.) 42 Atl. 87, 43 L. R. A. 490. In addition to these cases, the case of Salem Lyceum *v.* City of Salem, 154 Mass. 15, 27 N. E. 672, should be referred to. The property in that case was held to be inexempt, but it was said that, "if the principal occupation is by the plaintiff for those purposes [*i. e.* the purposes for which the plaintiff was incorporated], occasional and incidental use and occupation for other purposes might not render it liable to taxation"; thus recognizing that it is or may be the dominant purpose which gives character to the occupation. As illustrating still further the effect of intention not only upon the character of the occupation, but as establishing the fact of occupancy for a purpose entitling the property to exemption, see New England Hospital *v.* City of Boston, 113 Mass. 518, and Trinity Church *v.* City of Boston, 118 Mass. 164. See, also, Proprietors of Rural Cemetery *v.* County Com'rs, 152 Mass. 408, 25 N. E. 618. In this last case the petitioner, which was a cemetery corporation, was authorized to purchase additional lands, to be "applied exclusively" to the objects of the corporation. It purchased lands on which there was a dwelling house and barns, and it was assessed for these lands. At the time of the assessment complained of, no burial lots had been laid out on them. But it was held that it could not be said that the land was not devoted exclusively to the objects of the corporation, and that the exemption from taxation of the dwelling house and barns was justified by the fact that the buildings and their occupation, as described, were necessary for the business of the corporation and the management of the cemetery; and the property was accordingly declared to

be exempt. This case would seem to show that, even if the occupation was required to be exclusively for the purposes for which the institution was incorporated (which we do not think it is), an occupation by an officer and his family might be regarded under some circumstances as exclusively for such purposes, notwithstanding the element of private benefit. Whether the occupancy of Prof. Taylor should be referred to his life estate or to his connection with the academy as professor, or whether the academy is taxable for its reversionary interest, we do not deem it necessary to consider now.

Down to this point, we are all substantially agreed. But some of my Brethren think that the facts are not stated with sufficient fullness to enable us to pass satisfactorily upon the question thus far considered, and that the agreed facts should be discharged and the case sent back, so that the facts can be presented more fully. Others of my Brethren and myself are inclined to construe the agreed facts somewhat liberally, and to think that we can decide the case now. But with this expression I yield to the views of those of my Brethren who think otherwise, and am content that the agreed facts should be discharged and the case sent back for another trial.

There remains the question as to the street-watering assessments. It is hardly to be expected that any new facts which may be developed will affect that question. It will save time and further trouble, therefore, if we express our opinion on it now, and we see no objection to doing so. The assessments were made under St. 1895, c. 186, the constitutionality of which is attacked by the plaintiffs. A similar question under a similar statute was considered in Sears *v.* Board (Mass.), 1 Mun. Corp. Cas. 497, 53 N. E. 138, 43 L. R. A. 834, and the constitutionality of the statute was there upheld. We deem it enough on this point to refer to that case. It is settled that local or special assessments like these do not

Watering Streets—Special Assessments—Constitutional Law.

Same—Same—Exemption from Taxation.

come within the exemptions from general taxation. Boston Seamen's Friend Soc. *v.* Mayor, etc., 116 Mass. 181. But it is contended that the provisions of the act were not complied with, because the vote appropriating the money for street watering did not provide that the assessors should assess the cost of watering on estates abutting on the streets that were watered. The vote did, however, contain an express reference to St. 1895, c. 186, and stated that the money was appropriated under that act. We think that the plain meaning of the vote was that the provisions of that act were to be applied in regard to the expenditure that was authorized, and that in the absence of anything limiting the amount of the assessment the fair inference was that the whole cost was to be assessed on the estates that abutted on the streets that were watered. All of the other provisions of the act were duly complied with, and we see no ground on which it can be held that the assessments were invalid. The result is that the agreed facts are to be discharged, and the case is to stand for another trial. So ordered.

Same—Same Compliance with Statute.

NOTES.

Local Assessments — Sprinkling Streets. — In Sears *v.* Boston (Mass.), 1 Mun. Corp. Cas. 497, it was held that a local assessment might be levied for the cost of sprinkling a street, and also in State *v.* Reis, 38 Minn. 371, 20 Am. & Eng. Corp. Cas. 473.

But a contrary view was upheld in Chicago *v.* Blair (Ill.), 36 N. E. 289; Pettit *v.* Duke (Utah), 37 Pac. Rep. 568; New York L. Ins. Co. *v.* Prest (C. C.), 71 Fed. Rep. 815.

Same—Exemptions.—General legislative exemptions of property from taxation are to be strictly construed. In pursuance of this principle it has been generally held that a law exempting property from "taxation," does not exempt it from assessments for street improvements. The two terms "taxes" and "assessment" are not synonymous, and the latter is not included in the former.

England.—Queen *v.* Oldham Borough, L. R. 3 Q. B. C. 474; Bedford Union Poor Guard *v.* B. Improvement Com'rs, 7 Exch. 777.

United States.—Ford *v.* Delta & P. L. Co., 164 U. S. 662; Illinois

Notes

C. R. Co. *v.* Decatur, 147 U. S. 190; West Wisconsin R. Co. *v.* Trempealeau County Supers., 93 U. S. 598.

Arkansas.—Davies *v.* Gaines, 48 Ark. 370; Board of Imp. *v.* School Dist., 56 Ark. 354, 37 Am. & Eng. Corp. Cas. 392.

California.—Taylor *v.* Palmer, 31 Cal. 240; People *v.* Austin, 37 Cal. 453; People *v.* Whyler, 41 Cal. 351; Emery *v.* San Francisco Gas Co., 28 Cal. 345; Williams *v.* Corcoran, 46 Cal. 553.

Connecticut.—Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255; Seymour *v.* Hartford, 21 Conn. 481; New Haven *v.* Fair Haven, etc., R. Co., 38 Conn. 422, 9 Am. Rep. 399.

Georgia.—Southwestern R. Co. *v.* Wright, 68 Ga. 311; Atlanta *v.* First Presby. Church, 86 Ga. 730.

Illinois.—Chicago, etc., R. Co. *v.* People, 120 Ill. 104; Peoria *v.* Kidder, 26 Ill. 351; Chicago *v.* Colby, 20 Ill. 614; Illinois, etc., Canal *v.* Chicago, 12 Ill. 403; Bank of the Republic *v.* Hamilton Co., 21 Ill. 53; McBride *v.* Chicago, 22 Ill. 574; Pleasant *v.* Kost, 29 Ill. 494; Illinois C. R. Co. *v.* Decatur, 126 Ill. 92, 37 Am. & Eng. R. Cas. 395; McLean County *v.* Bloomington, 106 Ill. 209; Chicago *v.* Baptist Theol. Union, 115 Ill. 245; Adams Co. *v.* Quincy, 130 Ill. 566; Bloomington Cem. Ass'n *v.* People, 139 Ill. 16; Illinois C. R. Co. *v.* Mattoon, 141 Ill. 32; Ottawa *v.* Free Church, 20 Ill. 423; Chicago, etc., R. Co. *v.* Quincy, 136 Ill. 489; People *v.* Graceland Cem. Ass'n, 86 Ill. 236.

Indiana.—Palmer Stumph, 29 Ind. 329; First Presby. Church *v.* Ft. Wayne, 36 Ind. 338, 10 Am. Rep. 35; Indianapolis *v.* Grand Lodge, 25 Ind. 518; M. E. Church *v.* Ellis, 38 Ind. 5; Marks *v.* Purdue University, 37 Ind. 155.

Iowa.—Dunlieth, etc., Co. *v.* Dubuque, 32 Iowa 427; Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa 286, 36 L. R. A. 63, 66 N. W. 176; Cassady *v.* Hamer, 62 Iowa, 359; Sioux City *v.* Ind. School Dist., 55 Iowa 150.

Kansas.—Paine *v.* Spratley, 5 Kan. 525.

Kentucky.—Bapt. Church *v.* McAtee, 8 Bush (Ky.) 508, 8 Am. Rep. 480; Zable *v.* Orphans' Home, 92 Ky. 89; Louisville *v.* McNaughten (Ky.), 44 S. W. 380; Kilgus *v.* Orphanage (Ky.), 22 S. W. 750.

Louisiana.—Rooney *v.* Brown, 21 La. Ann. 51; Crowley *v.* Copley, 2 La. Ann. 329; Lafayette *v.* Orphan Asylum, 4 La. Ann. 1.

Maryland.—Philadelphia, etc., R. Co. *v.* Bayless, 2 Gill (Md.) 355; Dolan *v.* Baltimore, 4 Gill (Md.) 394; Alexander *v.* Baltimore, 5 Gill (Md.) 396; Baltimore *v.* Green Mount Cem., 7 Md. 517.

Massachusetts.—Boston Soc., etc., *v.* Boston, 129 Mass. 178; Boston, etc., Soc. *v.* Boston, 116 Mass. 181, 17 Am. Rep. 153; Bleecker *v.* Ballou, 3 Wend. (Mass.) 263; Codman *v.* Johnson, 104 Mass. 491; Worcester Agric. Soc. *v.* Worcester, 116 Mass. 189; Harvard College *v.* Boston, 104 Mass. 470.

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Michigan.—Lefevre *v.* Detroit, 2 Mich. 586.

Minnesota.—St. Paul *v.* St. Paul & C. R. Co., 23 Minn. 469; St. Paul, etc., R. Co. *v.* St. Paul, 21 Minn. 526; State *v.* St. Paul, 36 Minn. 529.

Mississippi.—Southern R. Co. *v.* Jackson, 38 Miss. 334; Daily *v.* Swope, 47 Miss. 367; Coulson *v.* Harris, 43 Miss. 728, 737; Grand Gulf, etc., R. Co. *v.* Buck, 53 Miss. 246.

Missouri.—St. Louis Public Schools *v.* St. Louis, 26 Mo. 468; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495, 72 Am. Dec. 276; State *v.* Kansas, 89 Mo. 34; Farrar *v.* St. Louis, 80 Mo. 379; Lexington *v.* Aull, 30 Mo. 480; Lockwood *v.* St. Louis, 24 Mo. 20; Pacific R. Co. *v.* Cass Co., 53 Mo. 17, 1 Desty, Taxn. 146; Paris *v.* Farmers Bank, *Id.* 575; St. Joseph *v.* Hannibal & St. J. R. Co., 39 Mo. 376; State *v.* Dulle, 48 Mo. 282; Sheehan *v.* Hospital, 50 Mo. 155, 11 Am. Rep. 412; Sweaney *v.* Kansas City R. Co., 54 Mo. App. 265.

Nebraska.—Beatrice *v.* Brethren Church, 41 Neb. 358.

New Hampshire.—Brewster *v.* Hough, 10 N. H. 138.

New Jersey.—State, N. J. Midland R. Co. *v.* Jersey City, 42 N. J. L. 97; State *v.* Robertson, 24 N. J. L. 504; State *v.* Newark, 36 N. J. L. 478; State *v.* Newark, 24 N. J. L. 385; State *v.* Newark, 27 N. J. L. 185; State *v.* Mills, 34 N. J. L. 177, 10 Am. Rep. 223; State *v.* Newark, 35 N. J. L. 157, 10 Am. Rep. 223; State *v.* Jersey City, 42 N. J. L. 97; Chegary *v.* Jenkins, 3 Sandf. (N. J.) 409; Paterson *v.* Society, etc., 24 N. J. L. 385.

New York.—Hassan *v.* Rochester, 67 N. Y. 533; People *v.* Coleman, 121 N. Y. 542; Bleecker *v.* Ballou, 3 Wend. (N. Y.) 263; *In re* New York, 11 Johns. (N. Y.) 77; People *v.* Roper, 35 N. Y. 629; Buffalo City Cem. *v.* Buffalo, 46 N. Y. 506; *In re* St. Joseph's Asylum, 69 N. Y. 353; Roosevelt Hospital *v.* New York, 84 N. Y. 108; *In re* Second Ave. M. E. Church, 66 N. Y. 395; New York *v.* Cushman, 10 Johns. (N. Y.) 96; Sharp *v.* Johnson, 4 Hill (N. Y.) 92; Sharp *v.* Speir, 4 Hill (N. Y.) 76; People *v.* Brooklyn, 4 N. Y. 419; Brick Presby. Church *v.* New York, 5 Cow. (N. Y.) 538; *In re* Mayor of New York, 11 Johns. 80; Harlem Presby. Church *v.* New York, 5 Hun (N. Y.) 44; *In re* Van Antwerp, 56 N. Y. 261.

Ohio.—Kendrick *v.* Farquhar, 8 Ohio 197; Armstrong *v.* Athens Co., 10 Ohio 235; Cincinnati College *v.* State, 19 Ohio 110; Poock *v.* Ely, 4 Ohio C. C. 41; Toledo *v.* Bd. of Education, 48 Ohio St. 83; Bd. of Education *v.* Toledo, 48 Ohio St. 87; Lima *v.* Lima Cem. Ass'n, 42 Ohio St. 128, 5 Am. & Eng. R. Cas. 547, 51 Am. Rep. 809.

Oregon.—King *v.* Portland, 2 Ore. 155.

Pennsylvania.—Mt. Pleasant *v.* Baltimore & O. R. Co., 138 Pa. 365, 11 L. R. A. 520; Thiel College *v.* Mercer Co., 101 Pa. 530; Philadelphia *v.* Burial Ground Soc., 178 Pa. 533, 36 L. R. A. 203, 36

Atl. Rep. 172; Sewickley *v.* M. E. Church's Appeal, 165 Pa. 475; Northern Liberties *v.* St. John's Church, 13 Pa. St. 104; Crawford *v.* Burrell Tp., 53 Pa. St. 220; New Castle *v.* Stone Church Grave Yard, 172 Pa. 86, 33 Atl. Rep. 236; Beltzhoover *v.* Beltzhoover, 173 Pa. 213, 33 Atl. Rep. 247; Harvey *v.* South Chester, 99 Pa. St. 565; Wilkinsburg *v.* Home, etc., 131 Pa. St. 109; Philadelphia *v.* Penna. Hospital, 143 Pa. St. 367; Pray *v.* Northern Liberties, 31 Pa. St. 69; Olive Cem. Co. *v.* Philadelphia, 93 Pa. 129, 39 Am. Rep. 732; Donoghugh's Appeal, 86 Pa. 306.

Rhode Island.—Society *v.* Providence, 6 R. I. 235; *In re* College St., 8 R. I. 474; Beuls *v.* Providence Rubber Co., 11 R. I. 381, 23 Am. Rep 472; Prop'rs Swan Pt. Cem. *v.* Tripp, 14 R. I. 199.

South Carolina.—Martin *v.* Charleston, 13 Rich. Eq. 50.

South Dakota.—Winona, etc., R. Co. *v.* Watertown, 1 S. Dak. 46, 44 N. W. 1072.

Texas.—Allen *v.* Galveston, 51 Tex. 302.

Virginia.—Orange, etc., R. Co. *v.* Alexandria, 17 Gratt. (Va.) 176.

Tennessee.—M. E. Church *v.* Hinton, 92 Tenn. 188, 19 L. R. A. 289.

Wisconsin.—Hale *v.* Kenosha, 29 Wis. 599; Brightman *v.* Kivner, 22 Wis. 54; Dalrymple *v.* Milwaukee, 53 Wis. 178; Weston *v.* Shawano County Supers., 44 Wis. 256; Yates *v.* Milwaukee, 92 Wis. 352; Johnson *v.* Milwaukee, 40 Wis. 315.

TARBUTTON

v.

TOWN OF TENNILLE.

(*Supreme Court of Georgia, March 1, 1900.*)

Personal Injuries—Failure to Prohibit Bicycle Riding on Sidewalk—Liability of Municipality.*—There is no obligation upon the authorities of a municipal corporation, towards any one of its citizens, to exercise the legislative discretion with which they are invested to enact ordinances prohibiting any specific act concerning the streets and sidewalks of the town. Such matters are left to their discretion, and a right of action against a city does not accrue to one who was injured by a person riding a bicycle on the sidewalk, because the authorities had failed to prohibit such riding.

(Syllabus by the Court.)

*See generally Wheeler *v.* City of Poplar Bluffs (Mo.), *ante*, and *note* at end of case.

Tarbutton *v.* Town of Tennille

ERROR by plaintiff from Washington county superior court. *Affirmed.*

Evans & Evans, for plaintiff in error.
Rawlings & Hardwick, for defendant in error.

LITTLE, J. The plaintiff in error instituted an action against the town of Tennille in the county court of Washington county, and alleged in her petition that by the charter of said town it was made the duty of the municipal authorities to keep the streets in good order, and prevent injury or annoyance to the public or individuals from anything dangerous, offensive, or unwholesome; that one of the streets in said town, called "Main Street," is much traveled and used by the citizens and others, and it was a matter of public concern that said street should be kept in order and safe for travel; that in the year 1897 one Howard, with the full knowledge and consent of the town, did "recklessly and tortiously" ride a bicycle on said street, a walk intended only for pedestrians; that the plaintiff in error was quietly walking along the sidewalk about dark, when, without fault or negligence on her part, she was run over by Howard while riding his said bicycle, and was greatly injured, etc.; that Howard is insolvent, and she could recover no damages from him. The case was appealed to the superior court, and came up for hearing on a demurrer, which set out a number of grounds. The demurrer was sustained because the petition set forth no cause of action, and to the judgment sustaining the demurrer the plaintiff in error excepted.

It may be well enough to bear in mind at the outset that, if the defendant in error is liable at all, it can only be so because of the failure to prevent Howard from riding his bicycle on the sidewalk. The record does not disclose whether there is any ordinance in the town of Tennille prohibiting the use of bicycles on a sidewalk or not. If there is, the liability claimed must rest upon the failure to enforce it; and, if there is not, then the position of counsel would lead to the conclusion that it is liable for a failure to enact it.

If we assume, for the sake of the argument, that riding a bicycle on the sidewalk of one of the streets of a town is unlawful, it would not necessarily follow that such unlawful use of the walk would render the town liable. It is alleged in the petition that Howard rode his bicycle on the sidewalk, at the time the injury occurred, with the full knowledge and consent of the town of Tennille. This being the only allegation made as to the knowledge of the municipal authorities, the plain implication is that they had not seen fit to enact any ordinance against such use of the sidewalk, and we shall treat the case as involving the liability of the town for a failure to pass an ordinance prohibiting riding bicycles on its sidewalks; the position of the plaintiff being that they were invested with the power to enact such ordinance, and failed to do so. The enactment of ordinances for an incorporated town is a legislative act, and the failure to exercise the legislative power is a very different matter from a failure to perform a duty required by the law or the charter of the town,—such as, for instance, keeping its streets in good repair and order, so that pedestrians and others using the street may do so with reasonable safety. A failure to perform the latter duty gives a right of action to one who is injured, under certain circumstances, but we know of no law which would hold the municipal authorities liable in damages for a failure to exercise a legislative discretion in the enactment of ordinances. In the second volume of his work on Municipal Corporations (section 949), JUDGE DILLON says that "a municipal corporation is not liable to an action for damages either for the nonexercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character; * * * and the reason is that such powers are conferred to be exercised or not as the public interest is deemed to require, and there is no implied liability for deciding either that the public interest does not require action, or that it requires action in a particular way," —citing Wilson *v.* Mayor, etc., 1 Denio, 595; Cole *v.* Trustees, 27 Barb. 218; Lacour *v.* Mayor, etc., 3 Duer, 406. Mr. Tiede-

man, in his work on Municipal Corporations (section 327), declares that "it is a well-settled rule that for the nonperformance of a discretionary duty, particularly if the duty be of a public nature, no private action for damages can be maintained against the corporation, for the reason that discretionary powers are intended to be exercised only when the interests of the public demand their exercise; and the question whether the public interests do or do not demand it is one for the municipality to determine,"—citing authorities from the courts of last resort from a large number of the different states. In discussing the case of Davis *v.* City Council of Montgomery, 51 Ala. 139, the supreme court of Alabama said that the city corporation is bound to do what it had assumed to do upon a sufficient consideration, to wit, to keep its streets in order for safe travel and passage of the people and their property; that, for injuries incurred by a failure to perform the duties so undertaken, it would be liable to respond in damages, but the proposition that the city is liable for damages occasioned by nuisances erected in said city, if the corporate authorities fail to abate before the injury accrues, is not law, either as declared in the charter, or deduced from principle, and that for a failure to exert its judicial power the city is not liable, unless, possibly, it acts not only negligently, but corruptly. This court, in the case of Rivers *v.* City Council of Augusta, 65 Ga. 376, where it appeared that a minor child, while walking on the sidewalk of one of the streets in the city of Augusta, was set upon and seriously injured by a cow which was running at large, and it appeared that the city council had passed an ordinance forbidding the running at large of cattle in its streets, but had subsequently suspended its operation indefinitely, held that a failure to perform acts which are legislative or judicial in their nature, although conferred by a charter, did not render the city council of Augusta liable; that neither for a failure to perform such acts, nor for errors of judgment committed in their performance, could it be held responsible; and that it was within the discretion of the authorities to determine from

time to time what ordinances were proper. To the same effect, also, see Collins *v.* Mayor, etc., 77 Ga. 745. It was entirely discretionary with the municipal authorities of Tennille to exercise the legislative powers conferred on it by law, and enact an ordinance (which is a law of limited application to territory) preventing the use of sidewalks by a person riding a bicycle; and, if they deemed such an ordinance not to be for the best interests of the inhabitants of the town, it was entirely competent for them, in the exercise of the discretion with which they are invested, not to pass such an ordinance, and whether they did, and some person violated it, or did not, the town is not responsible to the person injured. The petitioner in this case might, if Howard was negligent or violated any general law applicable to the use of sidewalks, have an action against him, but there is no authority within our knowledge which empowers her to recover from the town. The demurrer was properly sustained, and the judgment of the court below is affirmed. All the justices concurring.

CITY OF DAYTON

v.

TAYLOR'S ADM'R.

(*Supreme Court of Ohio, Feb. 20, 1900.*)

Drains—Personal Injuries—Liability of Municipality for Adoption of Defective Plan.*—The manner in which drainage may be accomplished, if at all, is peculiarly within the discretion of a municipal corporation, and it cannot be called to account by the courts respecting its errors of judgment in the plans of a public improvement for drainage adopted by it. But after the construction of the improvement, when a defect dangerous to travel in a street, arising from such construction or the impairment thereof, is brought to the notice of the corporation, it becomes its ministerial duty, under the statute, to remove the defect, and a neglect or a refusal to remove the defect

*See extensive *note*, 1 Mun. Corp. Cas. 77 *et seq.*

after such notice would make the corporation liable for an injury resulting therefrom.

Same—Same—Assumption of Risk.—A pedestrian who, without necessity, and for his own pleasure and convenience, departs from the sidewalks and street crossings, upon which he would have avoided injury, and crosses a street intersection diagonally, and is injured by slipping into a catch-basin which lay between the crossings, must be held to have assumed the risks which lay in the path which he thus chose.

(Syllabus by the Court.)

ERROR by defendant to Montgomery county circuit court. *Reversed.*

Edwin P. Matthews, City Sol., for plaintiff in error.
George V. Nauerth, for defendant in error.

DAVIS, J. It is the duty of a municipal corporation to keep its streets in repair, and free from obstruction and nuisance. It is sufficient, however, if the streets are kept in reasonably safe condition for the ordinary modes of travel. It is impossible to so conceive a plan of construction, and to so carefully maintain it, that injuries may not happen on the streets to heedless persons; and therefore cities and villages are not held liable as insurers against accidents occurring upon their streets, and are held only to the exercise of reasonable caution and foresight in providing for the use of the streets in the ordinary modes, and with ordinary care, by the traveler. The defect complained of in this case was a catch-basin for surface water at the intersection of two streets. There is no evidence that it was imperfectly constructed or improperly placed, or that it had become defective and dangerous since its construction. It was located at a corner of the intersection, so that it was out of the traveled path of pedestrians; and it was so constructed, with a projecting top stone, that persons driving upon the street, and exercising ordinary care, would not be liable to accident from it. It was similar to other catch-basins in the city, and was built after plans and specifications prepared in the city

engineer's office, and was inspected and accepted by that officer. But it is the plaintiff's allegation "that the manner in which said catch-basin was constructed, the sudden and unnecessary fall given to the ground around the said catch-basin, they permitting the mouth of the same to remain open and unprotected, and the fact that there was no light at or near the said crossing, * * * made it dangerous and unsafe for persons to travel on said streets." The mere existence of the facts that there was a sharp inclination of the ground to the catch-basin for the distance of 10 feet, that the opening at the curb had neither screen nor bars over it, and that the height of the curb from the bottom of the gutter to the top of the catch-basin was 16 inches, does not constitute negligence; and there was no evidence to show that these were not necessary conditions to the successful operation of the catch-basin. Indeed, there was some testimony directly to the contrary. Yet, however these facts may be, appliances for drainage are necessary, and the manner in which drainage may be accomplished, if at all, is peculiarly within the discretion of the municipality, and it cannot be called to account by the courts respecting its errors of judgment in the plan of a public improvement. Wheeler *v.* City of Cincinnati, 19 Ohio St. 21, 22. But, according to many authorities, it would be held liable for negligence in carrying out the plan. At least, in Ohio, it cannot be doubted that if, after the construction of an improvement according to a plan and specifications adopted by the municipal authorities, notice should be brought home to the municipality that a street was not reasonably safe for use under ordinary circumstances, by reason of a faulty construction of the improvement, it would become a ministerial duty of the corporation to remove the defect, and a failure or refusal to do so after such notice would make it liable to respond in damages for an injury resulting from the defect. City of Circleville *v.* Sohn, 59 Ohio St. 285, 52 N. E. 788. If it be conceded that

Drains—Personal Injuries—Liability of Municipality for Adoption of Defective Plan.

such a defect existed here, there is an entire absence of proof that the corporation was aware of it.

Nor does it appear that the absence of a light at that point contributed in any degree to the plaintiff's injury. If he had followed the ordinary traveled way for pedestrians, he would not have come in contact with the catch-basin, which was situated between the street crossings at the southeast corner of the intersection of Pierce and Hawker streets. Without any necessity therefor, so far as appears in the record, and sorely for his own pleasure and convenience, he left the sidewalk at the northwest corner of the street intersection, and went diagonally across Hawker street to the southeast corner, where, using the plaintiff's own language, he "walked right into the basin." It is very clear, however, that he did not walk into, nor fall into, the catch-basin; for, owing to the form of its construction, that could not be. It was raining and freezing, and the street was slippery. He must have fallen and slipped into the basin. The only way in which he could have gotten his leg into the opening was by sliding. It does not appear that it was the absence of a light which caused him to fall and slide into the catch-basin; but it does appear that he was out of the ordinary traveled way for pedestrians, that there was no necessity for being out of the way, and that, if he had kept on the sidewalk and crossings, he would have avoided the injury. He was not exercising ordinary care for his own safety under the circumstances, and, in departing from the usual and safe way which the municipality had provided for him, he assumed all of the risks which lay in the path which he chose for himself.

Same—Same—Assumption of Risk.

We therefore hold that the court of common pleas erred in refusing to instruct the jury as requested by the defendant, and erred, also, in overruling the motion of the defendant for a new trial. For these errors, the judgment of the common pleas court, and the judgment of the circuit court in affirming the same, are reversed, and the cause is remanded for a new trial. Judgment reversed.

KASSELL

v.

MAYOR, ETC., OF CITY OF SAVANNAH.

(*Supreme Court of Georgia, Jan. 24, 1900.*)

Validity of Penal Ordinance where Act Covered by Statute.*—A municipal corporation cannot, without express legislative authority so to do, enact a valid ordinance for the punishment of an act which constitutes an offense against a penal statute of the state. It follows from this principle that if, on the trial of one charged with the violation of a municipal ordinance, it appears from the evidence that the accused has committed no act save what would constitute a violation of a penal statute of the state, over which no express authority has been by the legislature delegated to the municipality, a decision finding the accused guilty, and imposing a punishment for the alleged crime, is contrary to law.

(Syllabus by the Court.)

ERROR by defendant from Chatham county superior court. *Reversed.*

Saussy & Saussy, for plaintiff in error.

Saml. B. Adams, for defendant in error.

LEWIS, J. The plaintiff in error on May 29, 1891, was tried before the police court of the city of Savannah for the following offenses: (1) "Violating city ordinance; having her place of business (a barroom) open on Sunday, April 19, 1891." (2) "Violating second section of ordinance passed February 25, 1891, by selling liquor on Sunday, April 19, 1891." On May 25, 1891, this trial was concluded, and the police court entered the following judgment: "Fined one hundred dollars, or thirty days' imprisonment, for violating section second of ordinance passed in council February 25, 1891, by selling liquor on Sunday, April 19, 1891." An

*See *notes*, 1 Mun. Corp. Cas. 397 *et seq.*

appeal was entered from this decision of the mayor, who presided in the police court, to the mayor and aldermen of the city of Savannah. This appeal was tried in June, 1891, and a majority of the council trying the appeal confirmed the decision of the police court, whereupon the plaintiff in error filed her petition for *certiorari* to the superior court of Chatham county, and excepts to the judgment of the court overruling her petition.

It appears from the record that on February 25, 1891, the mayor and aldermen of the city of Savannah adopted an ordinance entitled "An ordinance to provide for the observance of the Sabbath or Lord's day," prescribing, in substance, that any person who kept within the city limits a barroom, or other place for the sale at retail of intoxicating liquors of any character, shall keep such place of business shut and closed from 12 o'clock Saturday night until 12 o'clock the following Sunday night. It was further provided in the ordinance that it should not be lawful for any person within the limits of the city of Savannah to sell in any quantity, or by any sort of device, any spirituous or intoxicating liquors of any character from 12 o'clock Saturday night to 12 o'clock Sunday night, except that a druggist or apothecary may sell the same as medicine, under prescription of a regular physician. It seems, therefore, that while the defendant below was tried for violating both the provisions of the ordinance above mentioned, to wit: First, keeping open her barroom and place of business on Sunday; and, second, violating the city ordinance against selling liquor on Sunday,—she was convicted upon the latter charge only. It appears from the evidence in the record that, if she was guilty of selling liquor in violation of the ordinance, this sale took place from her barroom, and therefore must have been in pursuit of her business, or the work of her ordinary calling on the Sabbath. One defense made on the trial of the case below, and insisted upon in the petition for *certiorari* as a reason why the judgment of conviction should be set aside, was that the mayor and aldermen of the city had no jurisdiction to try the

defendant under the charges set forth, which constitute a violation of penal laws of the state. Another ground of error alleged is that the verdict is contrary to evidence, and, if any offense was committed, it was in violation of a state law.

It may be considered as a principle well established by the adjudications of this court that a municipal corporation cannot, without legislative authority, pass an ordinance for the punishment of an act which constitutes an offense against a penal statute of the state. Rothschild *v.* City of Darien, 69 Ga. 503; Kahn *v.* City of Macon, 95 Ga. 419, 22 S. E. 641; Moran *v.* City of Atlanta, 102 Ga. 840, 30 S. E. 298; Keck *v.* City of Gainesville, 98 Ga. 425, 25 S. E. 559. The prosecution in this case is based upon the ordinance of February 25, 1891, above mentioned. In behalf of counsel for defendant in error, it is contended that this ordinance is justified by virtue of the powers conferred upon the municipal authorities of the city of Savannah by the act of December 22, 1857 (Acts 1857, pp. 166, 167). Under section 3 of that act, there was conferred upon the city council of Augusta the power "to pass all ordinances in relation to keeping open tippling houses on the Sabbath day in said city, and in relation to lewd houses, or houses of ill fame, for the purpose of suppressing them in said city, and in relation to selling or retailing intoxicating liquors to slaves or free persons of color in said city," etc. The next section extends the provisions of the act to the city of Savannah. It does not appear, therefore, from this act, that any power was delegated to these cities to pass such an ordinance as was adopted by the city of Savannah in reference to the sale of intoxicating liquors. So far as the sale or purchase of liquors was concerned, the act only related to slaves or free persons of color in said city. This act, therefore, confers no express legislative authority authorizing the passage of such an ordinance, and it follows that, if the facts relied upon for a conviction of the defendant in this case constitute an offense against the penal law of the state, the municipal court had no jurisdiction of the case, and the decision now under consideration is

unauthorized. That the facts relied on for a conviction constitute a penal offense against the state law, we think there can be no doubt. It appears from the record that the defendant below was engaged in the business and regular occupation of keeping a barroom for the purpose of retailing spirituous and other intoxicating liquors. Even if the evidence were sufficient to authorize the conclusion that she sold liquors on the day charged, this sale took place from her barroom, and was necessarily in the pursuit of her ordinary daily vocation. The state law in existence when this conviction was had is embodied in section 4579 of the Code of 1882, and provides that "any tradesman, artificer, workman or laborer, or other person whatever, who shall pursue their business or work of their ordinary callings upon the Lord's day (works of necessity or charity only excepted), shall be guilty of a misdemeanor." The same provision is substantially embodied in section 422 of the present Penal Code.

The prosecution in this case relied upon the case of Hood *v.* Von Glahn, 88 Ga. 405, 14 S. E. 564. We do not think that decision is in point. It appears there that the plaintiff in error was the keeper of a barroom, and a retail liquor dealer; and he was tried before the recorder's court of Augusta on the charge of "keeping open his bar on Sunday, July 19, 1891." The ordinance of that city, it is true, contained a provision against retailing, selling, or furnishing liquor to any person on Sunday; but it likewise contained the further provision that they should not open, or have or keep open, the doors or windows of their retail shops. The defendant was tried and convicted for a violation of the last provision mentioned. The only question before this court, then, was whether or not that portion of the ordinance against keeping open such tippling shops was authorized by the act of December 22, 1857. That is an entirely distinct offense from selling liquors. Keeping open a tippling house on the Sabbath day is made penal under a separate and distinct section of the Code. See section 4535 of the Code of 1882, and section 390 of the present Penal Code. The ques-

tion, therefore, as to whether or not a barkeeper engaged in his regular vocation of selling from his barroom liquor on Sunday was amenable to a municipal court for such a violation of a state law against pursuing one's ordinary vocation on the Sabbath was not made in that case; the only question being whether, under the act of 1857, the city council of Augusta could try him for violating an ordinance passed in pursuance of that act, which authorized specifically that council to pass all ordinances in relation to keeping open tippling houses on the Sabbath day. The case of Hill *v.* Mayor, etc., 72 Ga. 314, is also relied upon by the prosecution as authority which upholds the validity of a municipal ordinance providing that no person shall be allowed to sell spirituous or other intoxicating liquors within the limits of the city of Dalton in any quantity. It appears in that case that the charter of the city of Dalton gave to the municipality absolute authority over the whole liquor question. See page 318. It was there simply decided that the ordinance against selling the liquor did not provide for the same offense as that prescribed by the Code, which prohibited the keeping of a tippling house or the retailing of spirituous liquors without a license. The violation of the Sunday law in question was in no wise involved in that case. In Strauss *v.* City of Waycross, 97 Ga. 475, 25 S. E. 329, it was decided that "although a given act was, by a valid municipal ordinance, made an offense against the corporation at a time when such an act was not indictable under the criminal laws of this state, the subsequent enactment by the general assembly of a statute making the identical act a crime or misdemeanor deprived the municipal authorities (they having no jurisdiction over state offenses) of the power to try and punish offenders for committing the act in question." The decisions in the cases of Paulk *v.* City of Sycamore, 104 Ga. 728, 31 S. E. 200, Brown *v.* Town of Social Circle, 105 Ga. 834, 32 S. E. 141, and Cunningham *v.* City of Griffin (Ga.) 33 S. E. 664, contain nothing in conflict with our ruling in this case. The cases cited uphold an ordinance of the city making it an

offense against a municipality to keep for sale spirituous or intoxicating liquors. Those decisions were based expressly upon the idea that there was no provision in the state law making such acts of keeping liquor for the purpose of an illegal sale a penal offense.

We do not mean to say that the second section of the city ordinance in question should be treated as absolutely a void enactment. That portion of the ordinance simply provided generally against the sale of any spirituous or intoxicating liquors of any character on Sunday. If a person who committed such an act was not one whose business or ordinary calling involved the work of retailing spirituous or intoxicating liquors, the principle herein decided would not apply to his case. In the present case, however, it appears from the record that, if the accused was guilty of any offense at all, it consisted in pursuing her business, or the work of her ordinary calling, on the Lord's day, within the meaning of the penal law of the state on that subject. Judgment reversed. All the justices concurring.

TOWN OF CROWLEY

v.

WEST.

(*Supreme Court of Louisiana, Jan. 9, 1900.*)

Livery Stables—Nuisances—Municipal Powers.*—A municipality which has voluntarily passed under the dominion of Act No. 136 of 1898 cannot, under any general or implied authority, "suppress" or "locate" at pleasure a lawful business, which is not a nuisance *per se*, where the act confers authority, in specific terms, merely to prescribe regulations whereby the establishment in which such business is conducted shall be kept clean and in good order.

Same—Discrimination—Validity of Ordinance.—A *fortiori* is it incompetent for such municipality to enfore an ordinance, whether

*See notes at end of case.

Town of Crowley *v.* West

adopted before or after its acceptance of the act of 1898, the effect of which is to permit four livery stables to be maintained in its business center, while the fifth stable, and all others which may be hereafter established, are to be relegated and confined to a designated locality, remote from such center.

(Syllabus by the Court.)

APPEAL by defendant from mayor's court of Crowley. *Reversed.*

Hampden Story and *Philip S. Pugh*, for appellant.

Philip J. Chappuis and *Saunders & Gurley*, for appellee.

MONROE, J. Defendant was fined for violating an ordinance of the town of Crowley which prohibited the establishment of livery stables, except within certain limits; and he has appealed to this court, on the ground that said ordinance is in contravention of statutory and constitutional law. The ordinance in question was adopted in 1898, and while it declares: "Section 1. * * * That hereafter, it shall be unlawful to establish, maintain, locate, or operate a livery, feed, sale, and boarding, stable within any portion of the corporate limits of the town of Crowley, except as hereinafter prescribed,"—and then proceeds to establish the limits, remote from the business center of the town, in which such stables may be conducted, and to provide penalties for violation of the ordinance, the concluding section reads as follows, to wit: "Sec. 3. That the provisions of this ordinance should not be applied to livery, sale, boarding, and feed stables, already in existence and under operation: provided, that the effects of the ordinance shall not be governed by this section, which is hereby declared to be a distinct and independent part of the ordinance." The admissions and the evidence show that when the case was tried there were five livery stables within the prohibited section of the town; one of them being conducted by the firm of which the defendant is a member, and another being a stable which had been sold, before the adoption of the ordinance, by defendant's present partner to the person who is now conducting it. After this sale was made, and

Case Stated.

before the adoption of said ordinance, C. R. West, defendant's partner, purchased a lot, for which he paid $1,000, also within the prohibited district, and ordered lumber and material for the erection thereon of a new stable, which, as we understand, has been since built, at a cost of $1,300; and said firm have in the meanwhile, and after the adoption of said ordinance, carried on business in the stable for the maintenance of which the arrest was made. The ordinance, as it stands, will affect no other existing stable than that conducted by the defendant's firm; and said firm, if the ordinance is enforced, will be compelled to move within the limits designated, with the result that it will be unable to compete with the other stables, which are in the business portion of the town. The points relied on by the defendant are that the corporate powers of the town of Crowley are derived from Act No. 136 of 1898, and that said act confers no authority for the adoption of the ordinance in question; that said ordinance is invalid because it was not "entered in a well bound book," as required by said act; that said ordinance is unconstitutional and illegal for the further reason that it is "discriminatory, unreasonable, arbitrary, and unequal in its operation and effect," and would "operate a hardship on defendant, by compelling him to remove his stable from a limit where livery stables are now prohibited, to a locality designated and set aside for that purpose, remote and distant from the central portion of business, where others, his competitors, are permitted to carry on a similar and like occupation, unmolested, and free from municipal interference and objection"; that said ordinance abridges defendant's liberty with respect to the selection of a means of livelihood, and denies him the enjoyment of his rights and privileges and of his property as guarantied by the constitution of the United States.

The town of Crowley was originally incorporated in 1894, agreeably to the provisions of Act No. 49 of 1882. The act of 1882, however, purports merely to regulate the "manner" of incorporation, and contains no specific grants of power.

Whatever authority was exercised by the corporation thus established must therefore have been implied from the fact of its authorized existence as a municipal corporation. In 1899 said corporation, by the vote of its electors and the proclamation of the governor, as required by the act, accepted the offer made by the state by means of Act No. 136 of 1898, and became a "town," under said act. The act of 1898 is of much broader scope than that of 1882, since the latter provided only for the "manner" of effecting incorporation, while the latter provides, not only for the creation of corporations where none previously existed, and for the conversion of corporations already established under previously adopted statutes into corporations acknowledging it (said act) as the authority within which alone they exist, but it also specifies, in terms of great exactness, the powers which are to be exercised by the corporations so created or converted, and it concludes with a clause which repeals all laws contrary to it or "on the same subject-matter," except as otherwise provided in the act itself. The acceptance of this act by the town of Crowley, as the Jordan through which it was born again, if it does not cut off inquiry into any previous existence, at least reduces that inquiry within very definite bounds. It may be conceded that existing ordinances adopted during such previous existence were not necessarily annulled by the regeneration of the town thus effected. But it must also be conceded that no such ordinance can be enforced, if found to conflict with the law within which the town now lives and moves and has its being, since the creature, in matters of this kind, is not more powerful than the creator. The charter of 1894, assumed for the town the power, among other things, to regulate the "location" as well as the inspection and cleaning, of "stables, cattle yards, slaughter houses, soap, glue, tallow, and leather, factories, depositories for hides, and all such places of business, likely to be, or to become, detrimental to health," etc.; and it was under this charter that the ordinance in question, which undertakes "to regulate the loca-

tion of stables," was adopted. But since the acceptance of the act of 1898 there is no room for the assumption or exercise of any power not expressly or impliedly conferred by the act.

It is not pretended that the act of 1898 in express terms confers upon corporations established under it any authority to regulate the location of stables. The remaining question then is, can such authority be implied? The act provides, in substance:

"Sec. 13. That each city, town, or village, which is incorporated, shall be governed by the provisions of this act and shall be a municipal corporation, with power: First, to sue and be sued," etc.; "second, to purchase and hold real estate," etc.; "third, to make all contracts," etc.; "fourth, to exercise such other or further powers as are herein conferred."

"Sec. 14. That the powers herein granted shall be exercised by the mayor and board of aldermen," etc.

"Sec. 15. That the mayor and board of aldermen shall have power to enact ordinances for the purposes hereinafter named, and such as are not repugnant to the laws of the state, and they shall have power: First, to levy and collect taxes for general purposes," etc.; "second, to levy and collect taxes to pay interest," etc.; "third, to make regulations to secure the general health of the municipality; to prevent, to remove, and to abate, nuisances; to regulate, or prohibit the construction of privy-vaults and cesspools and to regulate or suppress those already constructed; to compel and regulate the connection of all property with sewers and drains; to suppress hogpens, slaughter houses and stock yards and to locate the same with the concurrent approval of the board of health, or to regulate the same and to prescribe and enforce regulations for cleaning and keeping the same in order, and the cleaning and keeping in order of warehouses, stables, alleys, yards, private ways, outhouses, and other places, where offensive matter is kept or allowed to accumulate; and

to compel and regulate the removal of garbage and filth, beyond the corporate limits."

And there are 29 more paragraphs in section 15, each conferring separate and specific powers on cities and towns and villages falling under the dominion of the act. In section 16 there are 11 distinct paragraphs, conferring specific powers on cities and towns, but not on villages; and in section 17 there are five paragraphs, which confer still further specfic authority on cities and towns having more than 2,000 inhabitants. But nowhere else in the act are stables mentioned, save in the paragraph above quoted, where the corporations affected by said act are authorized to prescribe and enforce regulations for cleaning them and keeping them in order, in common with warehouses, alleys, private ways, outhouses, etc., while, in the same connection, and as part of the same sentence, the power is conferred to suppress hogpens, slaughter houses and stock yards, or to locate the same. It will be observed, however, that the power to "suppress" and to "locate," thus conferred, is guarded by the qualification that it is to be exercised "with the concurrent approval of the board of health." The question, then, very naturally suggests itself: If the legislature had intended that the municipal corporations affected by the act of 1898 should be authorized at pleasure to "suppress" or to "locate" warehouses and stables, what was to prevent the use of the language granting that authority, and why was language used which authorizes other action, and falls short of authorizing such suppression or location? And, again, is there any reason to suppose, taking the whole paragraph quoted together, or taking the various provisions which have been referred to together, that the lawmakers, in specifically authorizing the suppression or location of hogpens and slaughter houses, would require such action to be taken "with the concurrent approval of the board of health," and yet that they intended that warehouses and stables should be suppressed, or located upon the outskirts of the town, without the concurrence of the board of health, although the authority,

as granted, with respect to them, extends only to the prescribing and enforcing of regulations for keeping them clean and in order? The law applicable to the conditions as presented is, as we think, fully stated in the following language: "* * * The extent of municipal authority over nuisances depends, of course, upon the powers conferred in this regard upon the municipality. They may be general or specific, or both. The authority to preserve the health and safety of the inhabitants and their property, as well as the authority to prevent and abate nuisances, is a sufficient foundation for ordinances to suppress and prohibit whatever is intrinsically and inevitably a nuisance. The authority to declare what is a nuisance is somewhat broader, but neither this nor the general authority mentioned in this last preceding sentence will justify the declaring of acts, avocations, or structures not injurious to health or property to be nuisances. * * * It is not unusual to invest the municipal council with special authority with respect to particular avocations, trades, acts, omissions, and structures, with a view to conserve the public health and safety. The terms in which such authority is conferred measure its scope, but, in view of the end for which it is given, it is not subjected to a hostile, or even to a narrow, construction." 1 Dill. Mun. Corp. par. 379. "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws, either of the city or state, within which a given structure can be shown to be a nuisance, can, by mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city at the uncontrolled will of the temporary local authorities." Yates *v.* Milwaukee, 10 Wall. 497, 19 L. Ed. 984.

Livery Stables—Nuisances—Municipal Powers.

It has frequently been held that a livery stable is not a nuisance *per se*. Shiras *v.* Olinger, 50 Iowa, 571; Pickard *v.* Collins, 23 Barb. 444; Harrison *v.* Brooks, 20 Ga. 537; Burditt *v.* Swenson, 17 Tex. 489; Wood, Nuis. §§ 528, 529.

And in the case at bar the mayor, before whom it was tried, declined to permit the defendant's counsel to ask a witness who was upon the stand, "In what manner and in what condition is the stable in controversy kept?" on the ground that the question before him was not how the stable was kept, or whether it was a nuisance, but whether or not the town had the right to enforce the ordinance which prohibited the keeping of the stable where it then was. There is nothing in the record, therefore, to indicate that the defendant's stable was objectionable in any way whatever, or to anybody, except (1) the preamble to the ordinance under which he was prosecuted, which reads, "Whereas, the indiscriminate establishment of livery, feed, boarding and sale stables, endangers the public health and the public safety, prejudices the comfort and well-being of the community, depreciates the value of property, and greatly increases the danger of fire, therefore," etc.; and (2) the following statement, embodied in the mayor's reasons for judgment, to wit: "It is even more than an ordinary stable, being large, and being used for the penning and accommodation of a large number of animals for sale, and which make considerable litter, noise, and disturbance by their constant tramping upon the floor, thus affecting the health and comfort of the surrounding residents." This declaration in the ordinance cannot fasten upon a business, which is not in itself a nuisance, the pernicious, destructive, and altogether alarming qualities which the language used attributes to it, any more than these qualities can be fastened upon a "warehouse" or an "outhouse" by the mere use of language. Nor can we accept the statement in the opinion of the mayor as being conclusive upon the point to which he refers, since we find absolutely no testimony to that effect in the record,—not even that of the prosecuting witness; and the mayor, as has been stated, had ruled out all evidence upon the subject offered in behalf of the defendant. We have, then, a case in which it appears that a person engaged in a business which is conceded to be lawful, in which four other persons or firms are engaged, in the

same town, and which, so far as the record discloses, is conducted properly and inoffensively, is nevertheless, by the operation of a municipal ordinance, arrested and fined because he has failed to establish his said business in a part of the town remote from the business center, rather than at the place which he considers most advantageous; and it further appears that the other four persons or firms engaged in the same business are not to be affected by the ordinance, but are to be permitted to conduct their business where they please, and that it naturally pleases them to remain in the central part of the town, from which the defendant is to be permanently excluded. The proposition that the defendant can be thus discriminated against, and that his four competitors in business can be thus secured the monopoly in perpetuity of the livery stable business in Crowley, cannot be seriously entertained. State *v.* Mahner, 43 La. Ann. 496, 9 South. 480; State *v.* Dulaney, 43 La. Ann. 500, 9 South. 481; State *v.* Garibaldi, 44 La. Ann. 814, 11 South. 36; State *v.* Sarradat, 46 La. Ann. 703, 15 South. 87, 24 L. R. A. 584; State *v.* Kuntz, 47 La. Ann. 107, 16 South. 651; Tugman *v.* City of Chicago, 78 Ill. 409; Dill. Mun. Corp. (4th Ed.) par. 322.

Same—Discrimination—Validity of Ordinance.

It is said, however, that, by the terms of the ordinance itself, the section by which it was made inapplicable to those keepers of livery stables who were in business before its adoption is to be regarded as in the nature of an independent enactment, which may be declared null without affecting the other sections, and that the ordinance may be held to apply to all livery stables in Crowley, and to require the proprietors of such stables either to close them up and to go out of business, or else to move them within the territory prescribed by the ordinance. Pretermitting the consideration of the question whether such a method of dealing with the ordinance would be competent, and conceding, *arguendo*, that the section in question could be eliminated as suggested, we have remaining what may be called the main question; *i. e.* assuming that the ordinance

is to apply to all livery stable keepers in Crowley, and that under its provisions they will be compelled to move their establishments from the center of the town to the district designated therein, is the said ordinance a competent exercise of the authority vested in the corporation? We find nothing in the record which would justify us in answering this question in the affirmative. Ordinances of municipal corporations purporting to have been adopted in the exercise of implied or general authority must be "lawful," "reasonable," "impartial," "fair," "general," "consistent with public policy," and "not in contravention of common right." Dill. Mun. Corp. (4th Ed.) pars. 319–323, 325, 326, 329. It is doubtful whether the ordinance in question meets any of these requirements. The business to be affected is a legitimate business, and there is not a syllable of testimony in the record before us going to show that it is conducted otherwise than in a proper manner, and inoffensively to others. The declarations of the preamble to the ordinance are met by the admitted fact that four out of the five stables in Crowley which are said to endanger public health and safety, prejudice the comfort and well being of the community, depreciate the value of property, and increase the danger of fire, were to be left untouched, while the penalty for all this capacity for calamity breeding was to be visited on the defendant, as the proprietor of the fifth stable, which is not shown to differ in any respect from the others. Under these circumstances, even if the act of 1898 had not granted the corporate authority with respect to stables in specific terms, the general or implied authority to adopt ordinances in the interest of the general welfare of the community would not authorize such an oppressive discrimination between the defendant and other keepers of livery stables. But the specific character of the grant of authority to prescribe regulations for the "cleaning" and "keeping in order" of stables, warehouses, etc., taken in connection with the authority granted in the same section, and in equally specific terms, to "suppress" or "locate" hogpens, slaughter houses, etc., and taken in connection

Notes

with the general tenor of the act, leaves no room for doubt that it was the intention of the lawmakers to distinguish between establishments of different kinds, and that it was not intended that any greater authority should be exercised with respect to stables and warehouses than that which is conferred in terms. And this limitation applies equally to ordinances in existence when the town passed under the dominion of the act of 1898, and to those subsequently adopted. City of Shreveport *v.* Robinson, 51 La. Ann. 1314, 26 South. 277. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the ordinance (No. 88) under which defendant was convicted and sentenced be decreed null and of no effect; and that the defendant be discharged from further prosecution thereunder.

NOTES.

Power of Municipality to Declare What Is a Nuisance.—See generally Board of Aldermen, etc., *v.* Norman *et al.*, 1 Mun. Corp. Cas. 413, and *note*, 418 *et seq.*

Nuisances—Livery Stables.—A livery stable in a municipality may be a nuisance because of its location or the manner in which it is built or maintained; but it is not a nuisance *per se*. St. James Church *v.* Arrington, 36 Ala. 548, 76 Am. Dec. 332; Harrison *v.* Brooks, 20 Ga. 537; Coker *v.* Birge, 9 Ga. 425, 54 Am. Dec. 347; Keiser *v.* Lovett, 85 Ind. 242; Shiras *v.* Olinger, 50 Iowa, 571; Brookline *v.* Hatch, 167 Mass. 380, 36 L. R. A. 495; Green *v.* Lake, 54 Miss. 540, 28 Am. Rep. 378; Russell *v.* Beattie, 16 Mo. App. 131; Pickard *v.* Collins, 23 Barb. (N. Y.) 444; Dargun *v.* Waddill, 9 Ired. (N. Car.) L. 244, 49 Am. Dec. 421; Aldrich *v.* Howard, 7 R. I. 87; Kirkman *v.* Handy, 11 Humph. (Tenn.) 406; Burditt *v.* Swenson, 17 Tex. 489, 67 Am. Dec. 665.

MERNAUGH

v.

CITY OF ORLANDO.

(*Supreme Court of Florida, Dec. 13, 1899.*)

Ordinances—General and Special Authority.—When there are both special and general grants of power to municipal corporations to pass ordinances, those given under the special grant, as a general rule, can only be exercised in the cases and to the extent as respects those matters allowed by the charter or incorporating act; and the powers given under the general grant do not enlarge or annul those conferred by the special grant in respect to its subject-matters, but give authority to pass ordinances, reasonable in their character, upon all other matters within the scope of the municipal authority not repugnant to the constitution and laws of the state.

Regulation of Liquor Traffic—Municipal Powers.—The terms "regulate" and "restrain," contained in section 696, Rev. St., providing that the city or town council shall have power to regulate and restrain all tippling, barrooms, and all places where beer, wine, or spirituous liquor of any kind is sold at retail or to be drank upon the premises where sold; to require all such places to be kept and used subject to such reasonable regulations as the council may prescribe; and to require all keepers of such places to procure from the city or town a license for keeping the same, under pains, penalties, and forfeitures to be prescribed,—do not include the power to prohibit the sale of such liquors in the limits of a city or town, but contemplate the existence and continuance of places for the sale of the same, and restrict the city or town to reasonable regulations and restraints in the conduct of such business.

Same—Same.*—The general powers conferred upon cities and towns by section 673, Rev. St., to pass ordinances that may be necessary or expedient to preserve the public peace and morals, for the suppression of riots and disorderly assemblies, and for the order and government of the city or town, construed in connection with sections 696 and 677, do not authorize the passage of an ordinance making the sale of intoxicating liquors, wines, or beer an offense, even when the county in which the city or town is situated has voted

*See notes at end of case.

against the sale of such liquors at an election held in pursuance of article 19 of the constitution, and laws adopted to put the same in operation.

Same—Licenses—Statute—Repeal.—Section 696, Rev. St., authorizing cities and towns to license places for the sale of intoxicating liquors, is not repealed by a vote against the sale of the same in a county in which the city or town is situated, under article 19 of the constitution, but is only suspended during the time that the local option continues in force.

Certiorari.—The supreme court has power to review and quash on the common-law writ of *certiorari* the proceedings of inferior tribunals when they proceed in a cause without jurisdiction.

(Syllabus by the Court.)

CERTIORARI by defendant. *Judgment quashed.*

Massey & Baumgarten and *J. M. Cheney*, for petitioner.
Wm. H. Jewell, for respondent.

MABRY, J. N. Mernaugh, petitioner in this court for *certiorari*, was convicted and fined in the municipal court of the city of Orlando on a charge of violating an ordinance of the city, and appealed to the circuit court, where the sentence was affirmed. Case Stated.

The city ordinance was passed in May, 1899, and the portion alleged to have been violated, and alone involved in the case, provides that the sale of any intoxicating liquors, wines, or beer, when a municipal license is interdicted by law, is made an offense against the peace, good order, and morals of the city, and any person convicted thereof shall be punished by a fine of not less than $50 nor more than $500, or by confinement to labor for not less than 30 days nor more than 60 days, or by both such fine and confinement to labor. The affidavit filed in the municipal court, and the warrant issued thereon, charged the petitioner with a violation of the provision of the ordinance stated, and upon that charge the trial was had. The proof in the municipal court showed a sale of a bottle of whisky by petitioner after the adoption of the ordinance; and it also showed, we concede for the purposes of this decision, that prior to the adoption of the ordinance there was a majority

vote of the people of Orange county, in which the city of Orlando is situated, against the sale of intoxicating liquors, wines, or beer in the county, at an election held in pursuance of article 19 of the constitution, and the statutes adopted to put the same in operation. The defense made in the municipal court was that the provision of the ordinance in question was void because the city council had no authority to pass it; and in the circuit court the objection was made that the municipal court had no jurisdiction, for the reason stated, to proceed against the petitioner under the ordinance. After the affirmance of the municipal sentence on appeal in the circuit court, a writ of *certiorari* was obtained from this court to bring up the record before the circuit judge; and we are asked to quash the proceedings on the ground of want of jurisdiction in the inferior court, and the absence of any other remedy.

Counsel for the city insists that the ordinance is valid, and no objection is made to the remedy if the ordinance be found to be void.

The city of Orlando, as shown by the record, was organized under the general laws for the incorporation of cities and towns, and whatever powers it has must be derived from that source. Section 673, Rev. St., provides as follows: "The city or town council shall have power to pass all such ordinances and laws as may be expedient and necessary for the preservation of the public peace and morals, for the suppression of riots and disorderly assemblies, and for the order and government of the city or town, and to impose such pains, penalties and forfeitures as may be needed to carry the same into effect; provided, that such ordinances shall not be inconsistent with the constitution and laws of the United States or of this state; and, provided further, that for no one offense made punishable by the ordinances and laws of said city or town shall a fine of more than five hundred dollars be assessed, nor imprisonment for a period of time greater than sixty days." Under this grant of power it is claimed for the city that the ordinance can be sustained. It may be conceded

that, if there were no other grant of power or legislative regulations on the subject-matter of the ordinance, the city could, under the rule of construction of municipal grants obtaining in this state (Jacksonville Electric Light Co. *v.* City of Jacksonville, 36 Fla. 229, 18 South. 677, 30 L. R. A. 540; *Ex parte* Simms, 40 Fla. —, 25 South. 280), enact it. The sale of whisky in a city tends to disturb the public peace and to produce disorder therein; and where it is not licensed, but forbidden, by state law, a city might well be permitted, under an unrestricted grant of power like that contained in section 673, Rev. St., standing alone, to punish whisky selling, as being against the peace and good order of the city. But there is another grant of power to cities found in the general incorporating act relating to the particular subject of whisky selling, contained in section 696, as follows: "The city or town council shall have power to regulate and restain all tippling, barrooms, and all places where beer, wine, or spirituous liquor of any kind is sold at retail, or to be drank upon the premises where sold, billiard saloons, ten-pin alleys, theatres or public halls, and all places used for public exhibitions, games, or amusements of any kind, and taverns, hotels and other houses for public entertainment; to require all such places to be kept and used subject to such reasonable regulations as the council may prescribe; to require all keepers of such places to procure from the city or town a license for keeping the same, under such pains, penalties and forfeitures as the council may prescribe." The word "regulate," in this section, does not include the power to prohibit; nor does the word "restrain," in the connection in which it is used, confer it. Section 696, Rev. St., was compiled from the act of 1879, c. 3163; and, whatever may have been the meaning of the word "restrain" in prior statutes, it cannot be construed to mean "prohibit," in the connection it is employed in the chapter mentioned. When the act of 1879 was passed, it was the settled policy of the state to tax and license whisky selling generally; and the power conferred upon cities and towns by

the terms "regulate and restrain," employed in the statute, contemplated the existence and continuance of such places therein mentioned, and authorized reasonable regulations and restraints to be thrown around them, so as to avoid an unnecessary abuse of the privilege to sell conferred by the state. We have then, in the general act under which the city of Orlando is organized, a general grant of power to pass ordinances to preserve the public peace and morals, to suppress riots and disorderly assemblies, and for the order and government of the city or town, and also a special grant of power to regulate and restrain barrooms and places where beer, wine, or spirituous liquor of any kind is sold at retail or to be drank upon the premises where sold; and, using the language of Mr. Dillon, "this difference is essential to be observed, for the power which the corporation would possess under what may, for convenience, be termed 'the general welfare clause,' if it stood alone, may be limited, qualified, or, when such intent is manifest, impliedly taken away, by provisions specifying the particular purposes for which by-laws may be made. It is clear that the general clause can confer no authority to abrogate the limitations contained in special provisions." 1 Dill. Mun. Corp. (4th Ed.) § 315. In section 316 this author formulates the general rule as follows: "When there are both special and general provisions, the power to pass by-laws under the special or express grant can only be exercised in the cases and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject-matters, but gives authority to pass by-laws, reasonable in their character, upon all other matters within the scope of their municipal authority, and not repugnant to the constitution and general laws of the state." The following cases, as well as numerous others that might be cited, illustrate the application of this rule: Mt. Pleasant

Ordinances—General and Special Authority.

v. Vansice, 43 Mich. 361, 5 N. W. 378; Huesing *v.* City of Rock Island, 128 Ill. 465, 21 N. E. 558; Steffy *v.* Town of Monroe City, 135 Ind. 466, 35 N. E. 121; State *v.* Fay, 44 N. J. Law, 474; Henke *v.* McCord, 55 Iowa, 378, 7 N. W. 623; Town of New Hampton *v.* Conroy, 56 Iowa, 498, 9 N. W. 417; Strauss *v.* Town of Pontiac, 40 Ill. 301; Sullivan *v.* City of Oneida, 61 Ill. 242; Goddard *v.* President, etc., 15 Ill. 588; Leonard *v.* City of Canton, 35 Miss. 189; State *v.* Ferguson, 33 N. H. 424; Walter *v.* Town of Columbia City, 61 Ind. 24; Tuck *v.* Town of Waldron, 31 Ark. 462; Harris *v.* Town of Livingston, 28 Ala. 577; City of Portland *v.* Schmidt, 13 Or. 17, 6 Pac. 221; Angerhoffer *v.* State, 15 Tex. App. 613.

Section 696 of the Reversed Statutes contains a grant of power to cities and towns over the special subject-matter of tippling houses, barrooms, and other places where spirituous liquors, wines, or beer are sold at retail or to be drank upon the premises where sold; and it also contains limitations upon the entire subject-matter covered by the grant. The power is to regulate and restain, which does not mean to prohibit. Under the rule stated, this grant of power, with its restrictions, excludes the power of the city to prohibit the sale of such intoxicants, which it might have under the general grant in section 673 if it stood alone. The city of Orlando has presumptively proceeded upon the theory that section 696, Rev. St., has been repealed, and can have no influence in determining the powers that it can exercise over the subject of whisky selling. The provision of the ordinance under which the prosecution is had made it an offense against the city to sell intoxicating liquors, wines, or beer when a city license was interdicted by law; and it appeared from the proof that the local option article of the constitution for suppressing the sale of such intoxicants had been put in force by a vote of the people. Assuming that the purpose of the ordinance was to punish the sale of beer, wine,

Regulation of Liquor Traffic—Municipal Powers.

or intoxicating liquors in the city of Orlando when a license to sell the same had been prohibited by the operation of the local option laws under a vote of the people, can we, under such conditions, regard section 696, Rev. St., as repealed or entirely removed from the consideration of the powers that the city can exercise in reference to such sales? Our judgment is that we cannot. By the prior uniform decisions of this court, the local option article of the constitution prohibiting the sale of intoxicating liquors, wines, or beer, when put in operation by a vote of the people, does not repeal, but simply suspends in the locality during its operation, the provisions of all statutes authorizing or licensing the sale of such intoxicants. Butler *v.* State, 25 Fla. 347, 6 South. 67; Cook *v.* State, 25 Fla. 698, 6 South. 451; State *v.* Smith, 26 Fla. 427, 7 South. 848; Stringer *v.* State, 32 Fla. 238, 13 South. 450; Cason *v.* State, 37 Fla. 331, 20 South. 547.

Same—Licenses—Statute—Repeal.

Section 696 is still in force, of course, in counties where the local option laws have not been put in operation; and in those counties where they do operate the section is not repealed, but simply suspended. There is a material difference in a statute being repealed or suspended. A repeal removes the law entirely, but when suspended it still exists and has operation in every respect except wherein it is suspended. Winterton *v.* State, 65 Miss. 238, 3 South. 735; Hearn *v.* Brogan, 64 Miss. 334, 1 South. 246. Vide State *v.* Patrick, 65 Mo. App. 653. If there had been a legislative repeal of section 696, it may be that the city would have the power, under section 673, to pass the provision of the ordinance in question; but, as there has been no repeal, both sections must be construed together.

Some contention is made on behalf of the city that the ordinance can be sustained under the power given cities and towns in section 677, Rev. St., to prevent and abate nuisances, but we do not see that it can. The statute has not conferred upon cities and towns the power to declare the sale of whisky a nuisance, and in fact the ordinance in question has not

Notes

undertaken to punish such sale as being a nuisance. The city may prevent or abate that which is a nuisance in fact (City of Orlando *v.* Pragg, 31 Fla. 111, 12 South. 368, 19 L. R. A. 196), but it was never contemplated by section 677 that a city or town council could punish the selling of whisky on the ground that the mere sale was a nuisance. Section 696 contains the special grant and limitations on the subject of liquor selling, and the city must look to that for its powers.

Our conclusion is that the city of Orlando had no authority to pass the portion of the ordinance for a violation of which the petitioner was convicted, and that the municipal court had no jurisdiction in the premises. Same—Same.

The rule established here is that the supreme court has power to review and quash, on the common-law writ of *certiorari*, the proceedings of inferior tribunals, when they proceed in a cause without jurisdiction, or when their procedure is essentially irregular and not according to the essential requirements of law, and no appeal or direct method of reviewing the proceedings exists. Railway Co. *v.* Boy, 34 Fla. 389, 16 South. 290; Hunt *v.* City of Jacksonville, 34 Fla. 504, 16 South. 398. Following this precedent, the judgment of the circuit court affirming the judgment of the city court of Orlando should be quashed. It is so ordered. Certiorari.

NOTES.

Power of Municipality to Prohibit Sale of Intoxicating Liquor.—See Brown *v.* Town of Social Circle, 1 Mun. Corp. Cas. 411, and *note*, 412 *et seq.*

Nuisances—Sale of Intoxicating Liquor.—A municipal corporation cannot declare the sale of intoxicating liquor a nuisance, unless authorized by the legislature. Jacksonville *v.* Holland, 19 Ill. 271; Byrs *v.* Olney, 16 Ill. 35; Bennett *v.* People, 30 Ill. 394. See also Marion *v.* Chandler, 6 Ala. 899; Commonwealth *v.* Murray, 138 Mass. 508; State *v.* Clark, 28 N. H. 176, 61 Am. Dec. 611.

But a house where it is sold unlawfully is a public nuisance. Brown *v.* State, 27 Ala. 47; Howard *v.* State, 6 Ind. 444; State *v.* Fertig, 70 Iowa 272; State *v.* Waynick, 45 Iowa 516; Com. *v.* Hersey, 144 Mass. 297.

CITY OF OMAHA

v.

CROFT *et al.*

(*Supreme Court of Nebraska, March 21, 1900.*)

Ultra Vires Acts of Officers—Ratification—Liability of Municipality.*—A municipal corporation is not civilly liable for the acts of its officers appointed to act for the corporation, which in their nature are wholly and necessarily outside of the powers of such officers, but such unauthorized acts may be adopted and ratified by other officers of such corporation, acting upon a matter or regarding a subject within the scope of their general powers and authority, although such unauthorized acts, in the manner performed, constituted a trespass, and, when so adopted and ratified, the corporation would be liable for the damages occasioned thereby.

Same—Same—Question for Jury.—The question of ratification or adoption of the unauthorized acts of the officers of a municipal corporation, by those having authority to act in the premises, is a question of fact, and, when properly submitted to a jury, its finding thereon will not be disturbed in this court, if supported by sufficient competent testimony.

Trespass — Appropriation of Property for Street — Liability of Municipality.*—A municipal corporation is civilly liable in damages for the wrongful acts of its officers, which relate to, and arise out of, matters or transactions within the general powers of the corporation, and in respect of which there may be a corporate liability; and if such officers, under the authority of the corporation to open or widen streets or boulevards, commit a trespass upon and seize and appropriate private property for such purposes, without complying with the statute providing for the condemnation of such private property, the corporation is liable in damages therefor.

Same—Same—Suit for Damages—Dedication.—In a suit for damages for the seizure and appropriation of private property for street or boulevard purposes, a judgment in such action will work a dedication of the property so appropriated to the corporation for the purposes for which it was taken.

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*See notes at end of case.

City of Omaha *v.* Croft

Harmless Error.—Instruction to the jury set out in the opinion not approved, but *held* to have not misled the jury, and not prejudicial error.

(Syllabus by the Court.)

ERROR by defendant to Douglas county district court. *Affirmed.*

W. J. Connell, for plaintiff in error.

Chas. Ogden and *J. W. West*, for defendants in error.

HOLCOMB, J. Suit was instituted in the district court of Douglas county by plaintiffs, defendants in error, to recover for the market value of land alleged to have been appropriated by the city of Omaha, plaintiff in error. Case Stated. The plaintiffs allege, in substance, that in the month of October, 1894, the defendant seized and appropriated to its own use a strip of land 50 feet in width and 330 feet in length, and staked off and graded the same for a boulevard, to plaintiffs' damage in the sum of $6,500. It is also alleged that no sum had been paid by the city for said land, and no proceedings had been taken to condemn the same by the exercise of the right of eminent domain. The answer of the defendant city denies that it ever, in any manner, seized or appropriated the strip of land described in the petition, and says that, if said strip of ground is traveled by persons or vehicles, it is without the knowledge or authority of the defendant, and that the defendant consents that the plaintiffs or others owning said land at once fence or inclose the same, and prevent any further travel thereon, which, if it exists or has existed, it charges was with the consent, connivance, or permission of the plaintiffs, for the purpose of commencing and maintaining the action for damages against the city. The corporate character of the defendant is admitted, and a denial is entered as to the other allegations of the petition. The reply denies the affirmative allegations of the answer. In due time a trial was had to the court and a jury, resulting in a verdict and judgment against the city for $800, with interest thereon amounting to $74.66. The

case is brought here for review of alleged errors committed in the court below.

In the trial of the case it is made to appear by the evidence that certain streets in the city of Omaha, by ordinance of the city council, had been widened, and turned into a boulevard, and placed under the control and supervision of the board of park commissioners, whose creation, powers, and duties are defined by section 838, c. 12a, Comp. St. 1899, the same being the metropolitan city act of this state. Among other things, the section referred to provides for the appointment of a board of park commissioners, composed of five members, and to be appointed by the judges of the district court, and defines their duties as follows: "It shall be the duty of said board of park commissioners to lay out, improve, and beautify all lands, lots, or grounds, now owned, or hereafter acquired for parks, parkways, or boulevards;" and also: "In each city of the metropolitan class, there shall be a board of park commissioners, who shall have charge of all the parks and public grounds belonging to the city, with power to establish rules for the management, care and use of public parks, parkways and boulevards, and it shall be the duty of said board, from time to time, to devise, suggest, and recommend to the mayor and council, a system of public parks, parkways, and boulevards, or additions thereto, * * * and to designate the lands, lots, or grounds necessary to be used, purchased or appropriated for such purpose. And thereupon it shall be the duty of the mayor and council to take such action as may be necessary for the appropriation of the lands, lots or grounds so designated, the power to appropriate lands, lots or grounds for such purpose being hereby conferred upon the mayor and council," etc. The boulevard mentioned began on Ames avenue, which seems to be one of the prominent streets of the city, and thence runs northward. Immediatedly south of Ames avenue, connecting with the boulevard mentioned, is a street known as "Twentieth Street," and upon which is situated the property the subject of this controversy. A

petition of the citizens of Omaha was presented to the council, praying for the extension of the boulevard southward along the said Twentieth street and other streets not here necessary to mention. A committee of the council viewed the location, and recommended the extension of the boulevard as petitioned for, the report of the committee being accompanied by a proposition or recommendation from the board of park commissioners to the effect that the board would agree to accept and maintain a boulevard on said Twentieth street, and other streets therein mentioned, whenever the mayor and city council would cause Twentieth street to be opened 100 feet wide, and cause the streets mentioned, including Twentieth street, to be graded to a uniform grade, and to dedicate such streets as boulevards, and place them under the charge and control of the park commission. An ordinance was then introduced and passed by the council, providing as follows:

"Section 1. That the following named streets in the city of Omaha be and are hereby designated for a driving boulevard for carriages and light vehicles: Nineteenth street from Chicago street north to Ohio street; thence west on Ohio street to North 20th street; thence north on 20th street to Ames avenue.

"Sec. 2. That said boulevard be and is hereby placed under the control of the park commission for the purpose of having said commission take charge of the said boulevard and to occupy, beautify and maintain the same in such a manner as the said park commission may determine: provided, the mayor and council reserve unto themselves the right to control the use and traffic thereon.

"Sec. 3. That this ordinance take effect and be in force from and after its passage."

No action appears to have been taken by the council towards widening any of the streets over which the proposed boulevard was to extend. It appears that the Twentieth street mentioned in the ordinance quoted was 66 feet in width, except where abutted by plaintiffs' land, an unplatted tract, the street there being only 33 feet in width, the land in

controversy occupying the other half of the street, where it widened so as to be of uniform width during its entire length. Under the above ordinance, the board of park commissioners took possession of the streets mentioned, and caused the same to be surfaced and graded to a proper level, and in so doing took possession of a strip of plaintiffs' land 33 feet in width and 330 feet in length, thereby making the said Twentieth street of the uniform width of 66 feet.

It is conceded that the park commission was without authority to act for defendant city in the matter of widening streets, or appropriating private property for such purposes, and that such acts were in no way valid or binding upon the city, unless the same had been adopted or ratified by the proper city authorities, thus making such unauthorized acts those of the city itself; and the case was tried upon the theory that, before the city became liable for the acts of the park commission in seizing plaintiffs' land and using the same for boulevard purposes, a ratification thereof must be shown to have been made by the officers and agents of the city having authority to condemn the land in the first instance. The jury were instructed that, "if the board of park commissioners did wrongfully appropriate said strip of land, the defendant city would not be liable for such strip, unless such appropriation was afterwards ratified by the defendant city."

Ultra Vires Acts of Officers—Ratification—Liability of Municipality.

The ordinance quoted authorized the park commission to take possession of the streets mentioned, and maintain the same as a boulevard for driving purposes, and the evidence shows that, assuming to act under the authority given them by ordinance, they entered upon the plaintiffs' land, seized the same, parked, surfaced, and graded it, so as to make it suitable for the purposes intended, and maintained it as such, sowing grass on the sidewalk space, grading up the center, and continuously kept employed, at the expense of the city, a person in charge of, and who was employed in sprinkling,

keeping, and maintaining in proper condition, such street as a boulevard, and that all of the expenses in connection with such control, labor, and supervision were, by ordinance of the city council, allowed and directed to be paid out of the proper funds of the city set aside for such purpose. It also appears that said street was maintained and kept open for public travel, and was in continuous use by the public, by pedestrians and vehicles, as a public highway.

The question of ratification having been properly submitted to the jury, and resulting adversely to the contention of the city, this court cannot disturb such finding, if supported by sufficient competent testimony, which we think it is. The owner has been deprived of the use of his property. The city, through its officers and agents, has taken possession of it, and is using it for the benefit of the public. It is being used and maintained as a public thoroughfare. The unauthorized acts of the park commission have been adopted and ratified by the officers and agents of the city having authority to act in the premises. The city is in as full, complete, and unrestricted possession of the property as it would be, and is using the same for boulevard purposes to the same extent as it could, had the property been taken by proceeding in condemnation in the exercise of the right of eminent domain. This, in our judgment, constitutes an appropriation of the property, which renders the city liable to the owners for its fair market value.

Same—Same—Question for Jury.

Section 118 of the charter act provides that "whenever it shall become necessary to appropriate private property for the use of the city for * * * parkways, or boulevards, * * * and such appropriation shall be declared necessary by ordinance, the mayor, with the approval of the council, shall appoint three disinterested freeholders of the city, who, after being duly sworn to perform the duties of their appointment with fidelity and impartiality, * * * shall assess the damages to the owners of the property and parties

interested therein respectively taken by such appropriation."

Trespass—Appropriation of Property for Street—Liability of Municipality.

Provisions are also made for the payment or deposit of the damages so assessed, and for appeals from such assessment. It is urged by counsel for the city that, in view of the provisions referred to for condemnation of private property for boulevard purposes, the acts of the park board and city council are void, and of no binding effect upon the city, and that no liability is created thereby. We do not think the principle invoked is applicable to the case at bar. If the acts of the park board were adopted or ratified by the city council, as we think they were, and the council was acting upon a matter or regarding a subject within the scope of its general power and authority, although such acts, in the manner performed, constituted a trespass, yet the city would be liable for the damages occasioned thereby. It is said by JUDGE DILLON in the fourth edition of his excellent work on Municipal Corporations (section 969) that "the principle that a municipal corporation is bound by the acts of its officers, only when within the charter or possible scope of their general powers, and that acts which in their very nature are wholly and necessarily, under all circumstances, outside of the powers of the corporation, or of the officers appointed to act for it, and therefore must be known to all persons to be so, are void as respects the corporation, is vital, and the opposite doctrine has no support in reason, and very little, if any, in the judgments of the courts." In section 971 the author lays down the following principle: "Cases such as those just mentioned are to be distinguished from others which resemble them in the circumstance of relating to wrongful acts, but which arise out of matters or transactions within the general powers of the corporation, and in respect of which there may be a corporate liability. Thus if, in exercising the power to open or improve streets, or to make drains or sewers, the agents or officers of a municipal corporation, under its authority or direction, commit a trespass

upon, or take possession of, private property, without complying with the charter or statute, the corporation is liable in damages therefor." The numerous authorities cited by the author abundantly substantiate the principle enunciated. The rule is reasonable, and is amply sustained. In the case of Soulard *v.* City of St. Louis, 36 Mo. 552, in the opinion it is said: "In this case the city proceeded to take and appropriate the plaintiff's property without pursuing the mode prescribed in its charter, authorizing it to enter upon and use, for its own purposes, the land of another, whenever it should be considered necessary or expedient for the furtherance of the public interests. The act done, then, was without authority of law. It was wrongful and amounted to a trespass." Further on it is said: "A corporation is civilly responsible for damages occasioned by an act, as a trespass or tort, done at its command, by its agents, in relation to a matter within the scope of the purpose for which it was incorporated." In the syllabus of the same case it is held: "A corporation is civilly responsible for damages occasioned by an act, as a trespass or tort, done at its command, by its agents, in relation to a matter within the scope of the purpose for which it was incorporated. Where a municipal corporation opened a street through the lands of an individual without first having the land condemned and damages assessed in the manner provided by its charter, in an action against such corporation for the damages sustained the value of the land taken will be the measure of damages, and a judgment for such damages will work a dedication of the land to the corporation." See, also, Mayor, etc., *v.* Perkins, 30 Ga. 154; City of Denver *v.* Peterson (Colo.) 36 Pac. 1111.

Same—Same—Suit for Damages—Dedication.

Objections are made to the admission of evidence and several instructions which relate to questions heretofore discussed, and they will not be further noticed.

Objection is also made to the instruction of the court to the jury with reference to the method of arriving at the

amount of damages sustained, which is as follows: "If you find from the evidence, and a preponderance thereof, that the land in question was wrongfully, and without authority of law, taken by the board of park commissioners, and appropriated, without the consent of the plaintiff, for boulevard purposes, and that defendant city afterwards ratified such taking, and you find the other material allegations in plaintiff's petition have been established by a preponderance of the evidence, then you would be authorized in allowing the plaintiff the highest market value of said strip of ground for any purpose for which it was adapted at the time of the taking by said board, as you find the same to be established by a preponderance of the evidence, together with interest thereon at 7 per cent. per annum from the 1st day November, A. D. 1894." It is urged that the language used is erroneous and prejudicial to the defendant city, wherein it is said to the jury: "You would be authorized in allowing the plaintiff the highest market value of said strip of ground for any purpose for which it was adapted at the time of the taking by said board, as you find the same to be established by a preponderance of the evidence." The evidence disclosed that the tract of land was suitable for residence property, and also available for use for storage, warehouse, or manufacturing purposes, because of its proximity to a belt-line railroad, encircling the city. The court evidently intended the language, and it was probably so understood by the jury, as telling them that if the property was more suitable for one purpose than another, as shown by the evidence, they were authorized to return a verdict for its market value for that purpose for which it would bring the highest price. In Lowe *v.* City of Omaha, 33 Neb. 588, 50 N. W. 760, in the syllabus is held: "The market value is not what the property is worth solely for the purpose for which it is devoted, but the highest price it will bring for any and all uses to which it is adapted and for which it is available." In the opinion by JUSTICE NORVAL

Harmless Error.

it is said: "If it [the property] was worth most in the market as a residence, the plaintiff was entitled to have such value considered, but, if it would have sold for the highest price for some other use to which it was adapted, she was entitled to that. The market value of anything is the highest price it will bring for any and all uses." In a New York case (*In re* Furman St., 17 Wend. 649) the writer of the opinion says: "In both cases the proper inquiry is, what is the value of the property for the most advantageous uses to which it may be applied?" The suit was brought to recover as damages the value of the land appropriated. Different witnesses testified as to its market value. The uses for which it was adapted entered into the valuations placed thereon, and the court very properly charged the jury upon that feature of the case. The plaintiffs were entitled to recover, if at all, the value of the property for the most advantageous and valuable uses to which it was adapted or for which it was available. This, in effect, was stated by the court; and, while we do not unreservedly approve of the language used in the instruction as given, we are of the opinion that the jury was not misled by it, or a greater recovery was had than is warranted by the evidence, nor were the plaintiffs prejudiced thereby. In Railroad Co. *v.* Gorsuch, 47 Neb. 775, 66 N. W. 834, it is said in the opinion: "Some of the instructions which were given, and to which objections were made and have been here urged, should probably not have been given in form and substance as they were, but the jury was not misled by them, nor did any prejudice result therefrom to the rights of the complaining party." In Carstens *v.* McDonald, 38 Neb. 858, 57 N. W. 758, CHIEF JUSTICE NORVAL, speaking for the court, says: "The giving of an erroneous instruction, when it does not have the tendency to confuse and mislead the jury, is not sufficient reason for vacating the judgment and granting a new trial." To the same effect is Stein *v.* Vannice, 44 Neb. 132, 62 N. W. 464.

The jury returned a verdict fixing plaintiffs' damages at

Notes

$800, with interest thereon amounting to $74.66. The testimony of the different witnesses placed the value of the property at from $200 to $2,400. A disinterested witness, engaged in the real-estate business, placed the value at $1,500. The jury saw the different witnesses, and heard their testimony as to the value of the property. They are the judges of their credibility, and the weight to be given to the testimony of each, and their verdict, in this respect, is supported by the evidence. Perceiving no reversible error, the judgment of the lower court is affirmed. Affirmed.

NOTES.

Municipal Corporations—Liability for Ultra Vires Acts.—See generally Holder *v.* City of Yonkers, 1 Mun. Corp. Cas. 164, and extensive *note*, 167 *et seq.*

Municipal Corporations—Liability for Torts.—According to the weight of authority, in the absence of statutory liability, where a municipal corporation acts exclusively as an agent of the state, in discharging duties forced upon it by, and belonging to the state, no action for the negligence, or even misfeasance, of its officers can be maintained; but where injury is caused by the negligence or unlawful act of municipal officers in exercising ministerial powers relating to matters not purely public, which, though public in a restricted sense, more directly affected the welfare and pecuniary interests of its inhabitants, the municipal corporation is liable to the same extent as an individual.

United States.—Hooe *v.* U. S., 1 Cranch (U. S.) 98; Mayor, etc., of N. Y. *v.* Sheffed, 4 Wall. (U. S.) 189; Evanston *v.* Gunn, 99 U. S. 660; Providence *v.* Clapp, 17 How. (U. S.) 161; Weightman *v.* Washington, 1 Black (U. S.) 39; Barnes *v.* District of Columbia, 91 U. S. 551; Supervisors of Rock Co. *v.* United States, 4 Wall. (U. S.) 435; Chicago *v.* Robbins, 2 Black (U. S.) 418; Nebraska City *v.* Campbell, 2 Black (U. S.) 590.

Alabama.—Allbrittian *v.* Huntsville, 60 Ala. 486; Snoot *v.* Mayor of Wetumpka, 24 Ala. 112.

Arkansas.—Mayor, etc., of Helena *v.* Thompson, 29 Ark. 569.

California.—Sherbourne *v.* Yuba County, 21 Cal. 113.

Connecticut.—Hewison *v.* New Haven, 37 Conn. 475; Chidsey *v.* Canton, 17 Conn. 478; Jones *v.* New Haven, 34 Conn. 1; Mead *v.* New Haven, 40 Conn. 72, 16 Am. Rep. 14.

Notes

Georgia.—Augusta *v.* Lombard, 99 Ga. 282, 25 S. E. Rep. 772; Mayor, etc., of Savannah *v.* Waldner, 49 Ga. 316.

Illinois.—Lacon *v.* Page, 48 Ill. 499; Champaigne *v.* Patterson, 50 Ill. 62; Stirling *v.* Thomas, 60 Ill. 265; Chicago *v.* Seben, 165 Ill. 371, 46 N. E. Rep. 244; Chicago *v.* Demody, 61 Ill. 431; White *v.* Bond Co., 58 Ill. 298, 11 Am. Rep. 65; Browning *v.* Springfield, 17 Ill. 143; Clayburgh *v.* Chicago, 25 Ill. 535, 79 Am. Dec. 346; Kinnare *v.* Chicago, 171 Ill. 332, 49 N. E. Rep. 536, 3 Chic. L. J. Wkly. 128; Blooming *v.* Bay, 42 Ill. 503; Town of Waltham *v.* Kemper, 55 Ill. 346, 8 Am. Rep. 652; Springfield *v.* Le Claire, 49 Ill. 476.

Indiana.—Ross *v.* Madison, 1 Ind. 281; Brinkmeyer *v.* Evansville, 29 Ind. 187; Logansport *v.* Wright, 25 Ind. 513.

Iowa.—Wallace *v.* Muscatine, 4 Greene (Iowa) 373; Cotes *v.* Davenport, 9 Iowa 227; Ogg *v.* Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Templin *v.* Iowa City, 14 Iowa 59.

Kansas.—La Clef *v.* Concordia, 41 Kan. 323; New Kiowa *v.* Craven, 46 Kan. 114; Caldwell *v.* Runnelle, 57 Kan. 511, 46 Pac. Rep. 949.

Kentucky.—Taylor *v.* Owensboro, 98 Ky. 271, 32 S. W. Rep. 948, 17 Ky. L. Rep.

Louisiana.—Johnson *v.* Municipality No. One, 5 La. Ann. 100; Walling *v.* Mayor, etc., 5 La. Ann. 660; Prather *v.* New Orleans, 24 La. Ann. 41; O'Neil *v.* New Orleans, 30 La. Ann. 220, 31 Am. Rep. 221; Pontchartain R. Co. *v.* New Orleans, 27 La. Ann. 162; Sherman *v.* Parish of Vermillion, 51 La. Ann. 880, 25 So. Rep. 538; McLaughlin *v.* Municipality No. Two, 5 La. Ann. 504; Wilde *v.* New Orleans, 12 La. Ann. 15.

Maine.—Reed *v.* Belfast, 20 Me. 248; Cumberland, etc., Canal Co. *v.* Portland, 62 Me. 504; Brown *v.* Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; Barbour *v.* Elsworth, 67 Me. 294.

Maryland.—Comm'rs, etc., *v.* Gibson, 36 Md. 229.

Massachusetts.—Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332; Curran *v.* Boston, 151 Mass. 505, 30 Am. & Eng. Corp. Cas. 506; Child *v.* Boston, 4 Allen (Mass.) 52, 81 Am. Dec. 680; Thayer *v.* Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157; Waldron *v.* Haverhill, 143 Mass. 582; Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 405; Perry *v.* Worcester, 6 Gray (Mass.) 544; Mower *v.* Leicester, 9 Mass. 247, 6 Am. Dec. 63; Boston *v.* Simmons, 150 Mass. 461; Hildreth *v.* Lowell, 11 Gray (Mass.) 345; Bigelow *v.* Inhabitants of Randolph, 4 Gray (Mass.) 541.

Michigan.—Detroit *v.* Blakeby, 21 Mich. 84, 4 Am. Rep. 450; Gilboy *v.* Detroit, 115 Mich. 121, 73 N. W. Rep. 128, 4 Dep. L. N. 841; Sheldon *v.* Kalamazoo, 24 Mich. 383.

Minnesota.—Simmer *v.* St. Paul, 23 Minn. 408; Gullikson *v.* McDonald, 62 Minn. 278; Gullikson *v.* McDonald, 62 Minn. 278, 54 N. W. Rep. 812; Kobs *v.* Minneapolis, 22 Minn. 160.

Notes

Mississippi.—Semple *v.* Mayor, etc., of Vicksburg, 62 Miss. 63, 52 Am. Rep. 181.

Missouri.—Kiley *v.* Kansas City, 87 Mo. 103, 13 Am. & Eng. Corp. Cas. 446; Moran *v.* Pullman Palace Car Co., 134 Mo. 641, 36 S. W. Rep. 659, 33 L. R. A. 755; Bullmaster *v.* St. Joseph, 70 Mo. App. 60; Murtaugh *v.* St. Louis, 44 Mo. 480; Armstrong *v.* Brunswick, 79 Mo. 319, 8 Am. & Eng. Corp. Cas. 404; Sexton *v.* St. Joseph, 60 Mo. 153.

Nebraska.—McConnell *v.* Dewey, 5 Neb. 385.

New Hampshire.—Wheeler *v.* Troy, 20 N. H. 77; Ball *v.* Winchester, 32 N. H. 435; Eastman *v.* Meredith, 36 N. H. 284, 12 Am. Dec. 302; Gilman *v.* Laconia, 55 N. H. 130, 20 Am. Rep. 175; Rowe *v.* Portsmouth, 56 N. H. 291, 22 Am. Rep. 464; Lewis *v.* Elizabeth, 25 N. J. Eq. 298.

New Jersey.—Chosen Freeholders *v.* Strader, 18 N. J. 108.

New York.—Rochester White Lead Works *v.* Rochester, 3 N. Y. 467, 53 Am. Dec. 316; Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Requa *v.* Rochester, 45 N. Y. 129, 6 Am. Rep. 52; Torney *v.* Mayor, etc., of N. Y. (N. Y.) 542; Storrs *v.* Utica, 17 N. Y. 104, 72 Am. Dec. 437; Sharp *v.* Mayor, etc., of N. Y., 40 Barb. (N. Y.) 256; Springfield F. & M. Ins. Co. *v.* Keesville, 148 N. Y. 46, 42 N. E. Rep. 405, 30 L. R. A. 660, 12 Am. R. & Corp. Rep. 640; Scott *v.* New York, 27 App. Div. 240, 50 N. Y. Supp. 191; Bailey *v.* Mayor, etc., of N. Y., 3 Hill (N.Y.) 531, 38 Am. Dec. 669; Barton *v.* Syracuse, 36 N. Y. 54; Byrnes *v.* Cohoes, 67 N. Y. 204; Burns *v.* Mayor, etc., of N. Y., 5 Thomp. & C. (N. Y.) 371, 3 Hun (N. Y.) 212; Bishop *v.* New York, 48 N. Y. Supp. 141; Quill *v.* New York, 55 N. Y. Supp. 889, 5 Am. Neg. Rep. 423; Mayor, etc., of Albany *v.* Cunliff, 2 N. Y. 165; McCullough *v.* Mayor, etc., of Brooklyn, 23 Wend. (N. Y.) 458; Maximilian *v.* Mayor, etc., of N. Y., 62 N. Y. 160, 20 Am. Rep. 468; Mayor, etc., of N. Y. *v.* Furze, 3 Hill (N. Y.) 612; McCarthy *v.* Syracuse, 46 N. Y. 194; Morey *v.* Newfane, 8 Barb. (N. Y.) 645; Masterton *v.* Mt. Vernon, 58 N. Y. 391; Mayor, etc., of N. Y. *v.* Bailey, 2 Den. (N. Y.) 433; Eddy *v.* Ellicottville, 35 App. Div. 256, 54 N. Y. Supp. 800; Lloyd *v.* Mayor, etc., of N. Y., 5 N. Y. 369, 55 Am. Dec. 347; Lacour *v.* Mayor, etc., of N. Y., 3 Duer (N. Y.) 406; Davenport *v.* Buckman, 37 N. Y. 568; Doty *v.* Port Jerois, 52 N. Y. Supp. 57; Davidson *v.* New York, 54 N. Y. Supp. 51; Weet *v.* Brockport, 16 N. Y. 161; Witt *v.* Mayor, etc., of N. Y., 5 Robt. (N. Y.) 248; Williams *v.* Dunkirk, 3 Lans. (N. Y.) 44; Walsh *v.* Mayor, etc., of N. Y., 41 Hun (N. Y.) 299; Vincent *v.* Brooklyn, 31 Hun (N. Y.) 122; Conrad *v.* Ithaca, 16 N. Y. 158; Hecker *v.* Mayor, etc., 18 Abb. Pr. (N. Y.) 369, 28 How. Pr. (N. Y.) 211; Hickok *v.* Plattsburgh, 15 Barb. (N. Y.) 427; Fitzpatrick *v.* Slocum, 89 N. Y. 358; New York, etc., Lumber Co. *v.* Brooklyn, 78 N. Y. 580; Noonan *v.* Albany, 79 N. Y. 470, 35 Am. Rep. 540; Peters *v.* Mayor, etc., of N. Y., 8 Hun (N. Y.) 405.

Notes

North Carolina.—Meares *v.* Wilmington, 9 Ired. L. (N. Car.) 73, 49 Am. Dec. 412; Coley *v.* Stateville, 121 N. C. 301, 28 S. E. 482.

Ohio.—Ironton *v.* Kelly, 38 Ohio St. 50; Dayton *v.* Pease, 4 Ohio St. 80; Western College of Medicine *v.* Cleveland, 12 Ohio St. 377; Rhodes *v.* Cleveland, 11 Ohio 159, 36 Am. & Dec. 82; Alvord *v.* Richmond (C. P.) 3 Ohio N. P. 136, 1 Ohio L. D. 177; Turner *v.* Toledo, 15 Ohio C. C. 627, 8 Ohio C. D. 196; Frederich *v.* Columbus, 58 Ohio St. 538, 51 N. E. Rep. 35, 47 Cent. L. J. 292, 48 Ohio L. J. 292; McCombs *v.* Akron, 15 Ohio 476.

Pennsylvania.—Ere *v.* Schwingle, 22 Pa. St. 388, 60 Am. Dec. 87; Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730; Harrisburg *v.* Saylor, 87 Pa. St. 216; Boyd *v.* Insurance Patrol, 113 Pa. St. 169, 16 Am. & Eng. Corp. Cas. 466; Pittsburg *v.* Grier, 22 Pa. St. 54.

Rhode Island.—Sprague *v.* Tripp, 13 R. I. 38, 43 Am. Rep. 11; Aldrich *v.* Tripp, 11 R. I. 141, 23 Am. Rep. 434.

South Carolina.—Young *v.* Commrs. of Roads, 2 N. & McC. (S. Car.) 537.

Tennessee.—Conelly *v.* Nashville, 100 Tenn. 262, 46 S. W. Rep. 565; Mayor, etc., of Memphis *v.* Lasser, 9 Hump. (Tenn.) 757; Irvine *v.* Chattanooga, 101 Tenn. 291, 47 S. W. Rep. 419.

Texas.—Galveston *v.* Posnainsky, 62 Tex. 118, 13 Am. & Eng. Corp. Cas. 484, 50 Am. Rep. 517; Conway *v.* Beaumont, 61 Tex. 10; Sterrett *v.* Houston, 14 Tex. 153.

Virginia.—Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 99 Am. Dec. 49; Richmond *v.* Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461; Noble *v.* Richmond, 31 Gratt. (Va.) 271, 31 Am. Rep. 726.

Utah.—Roye *v.* Salt Lake City, 15 Utah, 401, 49 Pac. Rep. 290; Petersburgh *v.* Applegarth, 28 Gratt. (Va.) 321, 26 Am. Rep. 357.

West Virginia.—Brown *v.* Guyandotte, 34 W. Va. 299, 11 L. R. A. 121.

Wisconsin.—Crossett *v.* Janesville, 28 Wis. 420; Kenworthy *v.* Town of Ironton, 41 Wis. 647; Ward *v.* Jefferson, 24 Wis. 342; Milwaukee *v.* Davis, 6 Wis. 377; Cook *v.* Milwaukee, 24 Wis. 270, 1 Am. Rep. 183; Durkee *v.* Kenosha, 59 Wis. 123, 48 Am. Rep. 480.

England.—Scott *v.* Mayor, 37 Eng. L. & Eq. 495; McKinnon *v.* Penson, 25 Eng. L. & Eq. 457; Mayor *v.* Henly, 2 Cl. & Fin. 331; Lan. Canal Co. *v.* Parnably, 11 Ad. & Ell. 223; Russell *v.* Men Devon, 2 T. R. Eng. 661.

Liability of Municipal Corporation for Trespass.—A municipal corporation committing through its officers or agents a trespass upon, or taking private property in attempting to exercise its powers relating to the making of public improvements, without complying with the requirements of law, is liable in damages to the property owner.

United States.—Pumpelly *v.* Green Bay & M. Canal Co., 80 U. S. 13 Wall. 168.

California.—Conniff *v.* San. Francisco, 67 Cal. 45.

Illinois.—Allen *v.* Decatur, 24 Ill. 332.

Indiana.—Platter *v.* Seymore, 86 Ind. 323.

Louisiana.—Walling *v.* Shreveport, 5 La. Ann. 660.

Maryland.—Cumberland *v.* Willson, 50 Md. 138.

Massachusetts.—Gordon *v.* Taunton, 12 Mass. 349; Ætna Mills *v.* Waltham, 126 Mass. 122.

Michigan.—Ashley *v.* Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Sheldon *v.* Kalamazoo, 24 Mich. 383.

Minnesota.—Sewall *v.* St. Paul, 20 Minn. 511.

Missouri.—Thurston *v.* St. Joseph, 11 Am. Rep. 463, 51 Mo. 510; Dooley *v.* Kansas City, 82 Mo. 444; Soulard *v.* St. Louis, 36 Mo. 546.

New Hampshire.—Eastman *v.* Meredith, 36 N. H. 284.

New York.—Hay *v.* Cohoes Co., 2 N. Y. 159; St. Peter *v.* Denison, 58 N. Y. 416.

Wisconsin.—Crossett *v.* Jamesville, 28 Wis. 420; Harper *v.* Milwaukee, 30 Wis. 365.

ROGERS *et al.*

v.

CITY OF ST. PAUL.

(*Supreme Court of Minnesota, Jan. 24, 1900.*)

The city of St. Paul, in 1891, instituted proceedings to grade East Third street from Earl street to the east city limits. Assessments were levied upon abutting property upon the rule of benefits. A contract was let for the improvement, and a great deal of work performed at different points, but the street was left for some distance to the west of plaintiffs' property in a less passable condition than before, and access to said property from the heart of the city was cut off by failure to complete the work. Plaintiffs' property was assessed in the sum of $4,706.94, and in default of payment the premises were sold to a third party for the amount due. After the work mentioned was performed, the defendant, on the 27th day of September, 1893, rescinded the grading contract. No more work was done towards completing the improvement. The plaintiffs' property was not benefited by the work as done.

Rogers *v.* City of St. Paul

Abandonment of Local Improvement—Recovery of Assessment—Pleading.*—*Held*, in an action brought by the property owners to recover from the city the money so received, it not appearing from the complaint that all of the money accruing from the assessment had not been expended upon the improvement, that the complaint (setting up the above-mentioned facts) does not state a cause of action.

Same—Same—Effect of Sale to Satisfy Assessment.—*Held*, conceding the complaint to be otherwise sufficient, the fact that the property had been sold by the city to satisfy the assessment did not deprive plaintiffs of their right of action.

(Syllabus by the Court.)

APPEAL by defendant from Ramsey county district court. *Reversed.*

Jas. E. Markham, *Carl Taylor*, and *Franklin H. Griggs*, for appellant.

H. J. & A. E. Horn, for respondents.

LEWIS, J. The complaint, in substance, alleges that on August 18, 1891, the defendant instituted proceedings for condemning and taking an easement in the land abutting on East Third street from Earl street, a mile and a half west of White Bear avenue, to the east city limits, a total distance of two and a half miles; that this easement was deemed necessary for the construction of cuts and fills in grading East Third street for this entire distance, the easterly mile of which had not been opened as a street until January 20, 1891; that this grading had been ordered as a single improvement; that the expense of the same was estimated and ordered to be assessed as a single improvement upon the property benefited, as provided by law; that, in pursuance of such proceedings, on March 29, 1892, a contract was duly entered into between said city and Keough & Donnelly to do the entire work by October 31, 1892, for the sum of $47,000, and to meet such cost an assessment according to benefits was made upon the abutting property, including the property of plaintiffs; that plaintiffs' property was assessed

Case Stated.

*See McConville *v.* City of St. Paul (Minn.), 1 Mun. Corp. Cas. 109, and *note*, p. 118.

in the sum of $4,706.94; that thereupon judgment was rendered, and entered in the district court for said sum, with interest and costs, and that said property of plaintiffs was duly sold on the 1st day of August, 1892, to F. V. Heyderstaedt, for the sum of $4,750.50, which amount was paid by said Heyderstaedt into the treasury of said defendant, and that said defendant ever since has had the full benefit of said payment and money; that said contractors commenced said work approaching a point between Clarence and Flandrau streets, a considerable distance west of White Bear avenue, and in the vicinity of plaintiffs' property; that between Clarence street and Birmingham street, which streets intervene between Earl and Flandrau streets, there was a deep hole, with gradually sloping approaches, before said contractors began work at that point, and that at another point in that vicinity there was a high bank, which it was possible to traverse; that the contractors did some work upon this hole and embankment, but left it in a worse condition than they found it, thereby rendering plaintiffs' property impassable by that street from the west; that no work whatever was done east of Flandrau street, and that the effect upon plaintiffs' property was a damage instead of a benefit. The complaint further alleges that said contract with Keough & Donnelly was rescinded by the defendant on September 7, 1893, and that said work and improvement was never resumed or completed, and has been permanently abandoned by defendant; "that, had said improvement been completed as projected, access to plaintiffs' property from the center of St. Paul to the east city limits would have been secured therefrom, and said property would have been benefited thereby to the amount of the assessment imposed thereon as aforesaid." To this complaint the defendant interposed a demurrer upon the ground that it did not set forth a cause of action. Demurrer overruled. Defendant appeals.

The plaintiffs place their right to recover distinctly upon the ground of a failure of consideration, and rely for their authority upon three decisions of this court, *viz.* Valentine

v. City of St. Paul, 34 Minn. 446, 26 N. W. 457; Strickland *v.* City of Stillwater, 63 Minn. 43, 65 N. W. 131; McConville *v.* City of St. Paul (Minn.), 1 Mun. Corp. Cas. 118, 77 N. W. 993, 43 L. R. A. 584. In the Valentine Case the assessment had been levied upon the plaintiff's property to defray the expense of grading a street, and he had paid the amount into the city treasury. Thereafter the proceedings were enjoined by the court, and the whole scheme abandoned. No work whatever was done towards carrying out the improvement, and the city retained the money. The court held that the effect of abandonment by the city of the project for and on account of which only the assessment had been made was that the consideration of the assessment wholly failed, and that an action would lie as at common law for money had and received. In the case of Strickland *v.* City of Stillwater the city began proceedings for an entire improvement to grade parts of three streets, including that part of a certain street in front of plaintiff's property. An assessment of $159.61 was levied upon plaintiff's property in accordance with the rule of benefits, to meet the cost of the general expense. For some reason the city abandoned the grading of the street in front of plaintiff's premises, but completed the improvement otherwise. The plaintiff sued to recover the entire amount of the assessment which she had paid into the treasury. The trial court rendered judgment in her favor for the full amount, but the judgment was reversed in this court upon the ground that the plan of improvement was a general scheme, and it did not follow that, because the grading was not done in front of plaintiff's premises, she was not benefited by the improvement at other points; and hence, if she could recover at all under such circumstances, the measure of damages would be the difference between what she paid and her actual benefits accruing from the work as done. While the opinion discusses at some length the possible rights of parties under such conditions, we need only to ascertain the true grounds upon which the decision rests. The rule of damages adopted

by the court below was manifestly wrong, but whether, under the facts presented in the record, plaintiff could recover upon some other rule of damages, we are not called upon to decide. There are a few facts, however, appearing in that case which must be emphasized, and which clearly distinguish the case from the one before us. First, in the Strickland Case the improvement was completed except in front of plaintiff's property, a distance of about 300 feet; second, that the cost of so completing the improvement was decreased presumably in the amount of the sum assessed against plaintiff's property; third, an amount equal to the sum paid by plaintiff was retained by the city in its treasury. Upon this state of facts possibly the plaintiff might recover as for a partial failure of consideration. The controversy in the case of McConville *v.* City of St. Paul grew out of the same improvement as is involved in the case now under consideration. In that case the plaintiff, who was the owner of lots abutting on Third street east of Clarence street, paid into the city treasury the amount of the assessment, and, after the work was abandoned, brought suit to recover it, relying upon the authority of the Valentine and Strickland Cases. While this court sustained a judgment in his favor, we think that the facts presented in the record, and the facts assumed and conceded to be before the court, make the case quite different from the one presented by the complaint in this action. It appears from the record in the McConville Case that the grading had been completed from Earl street east to within a short distance of Clarence street; that the plaintiff's property was situated about one-half mile east of Clarence street; and that the city left the street between said points in such condition as not to permit of travel. The court rests its decision upon the authority of the Strickland Case, and it appears from the opinion that the facts were assumed to be similar. The court assumed that the city had abandoned that part of the work east of Clarence street, and could not have referred to the part west of that point, because the record showed as stated that the work was completed to

Clarence street. Again, it was assumed or conceded, if it does not appear from the record, that the money paid in by the plaintiff was still unexpended, and was retained by the city. In this respect the following language is used in the opinion: "And with commendable forbearance he waited nearly six years for the city to complete its work after obtaining his money in August, 1892, which it keeps without the slightest evidence of its intent to complete its work of grading and improving the street named." Whatever may have been the actual fact, it is apparent that the decision of the court in the McConville Case was based upon the assumption, justified by the express or implied concession of counsel on the argument of the case, that the city, having received and retaining the plaintiff's money, abandoned the further prosecution of the proposed improvement. This brought the case within the principle of the Valentine and Strickland Cases.

We now come to the complaint in this action, and we find that it does not appear that the work was completed to Clarence street, and the exact position of plaintiffs' property is not stated. It appears that work was done in a general way along East Third street approaching Clarence street, and that the street was rendered impassable to plaintiffs' property by the acts of the city in partially executing the work, and then abandoning its further prosecution. It does not appear whether any work was done in front of plaintiffs' property. On this state of facts we would not be justified in holding that the city had abandoned that part of the work east of Clarence street, as distinguished from the other part. Again, there is no allegation that the money realized on the sale of plaintiffs' property was not expended on the improvement. There are some general statements in the complaint to the effect that the defendant retained and refused to pay plaintiffs the money received on the sale, but, when taken in connection with the fact that a large part of the work was done, and no cause for the

abandonment being assigned, these statements are too indefinite, and do not amount to an allegation that the money had not been so expended. It would be immaterial, if the city were otherwise liable, whether it retained the money in its treasury, or diverted it to some other use. Defendant could not render itself liable to an action for money had and received by abandoning the improvement, and not expending the money, and then shield itself by using it for some other purpose. The plaintiffs have their right to recover upon the authority of the cases mentioned, if the facts alleged are the same. They have followed the complaint in the McConville Case, and have argued and submitted the case upon the supposition that the facts are identical, yet it appears that the facts are not the same. We are then met with this question: Can plaintiffs recover, assuming that the city did not complete any special part of the work,—did not abandon any special part as distinguished from the whole,—but expended the money, so far as collected, upon the general improvement, leaving the whole incomplete? We think not. Under such circumstances the mere stopping of work because the money had been expended would not confer upon lot owners the right to recover the money paid. So far as appears from the complaint, this money may have been used in the undertaking, and, whatever remedy plaintiffs might have, there is no relief upon the ground of a failure of consideration.

Abandonment of Local Improvement—Recovery of Assessment—Pleading.

While the questions already discussed dispose of this case, another claim of defendant is presented for decision with a view to a possible amendment of the complaint. It is this: That the plaintiffs cannot recover in any event, because they are not the parties in interest, and have suffered no injury. This assertion is based upon the fact of the sale of the premises in question by the city to Heyderstaedt. Appellant contends that, because plaintiffs suffered the premises to go to a sale,

Same—Same—Effect of sale to Satisfy Assessment.

and did not redeem, they have not paid any money on the assessment, and that, whoever else may recover, plaintiffs cannot. We do not so hold. The law provides that the amount of the judgment shall be a first lien upon the premises. The plaintiffs may pay the money, or permit their property to stand subject to the lien, or be absorbed in payment of it. In either case they pay the amount. And the purchaser at the sale does not succeed to their rights. We need not here decide what the rights of a purchaser would be. The question is not directly involved. But we assume that in no event could a purchaser recover his money except upon the same state of facts as would give lot owners the right, and the city is not called upon to pay the money twice. Under such conditions it is possible that a purchaser might recover as for a failure in part of the consideration, growing out of the implied contract on part of the city to complete the work, and expend the money, presumably for the benefit of the premises. Whatever be the legal remedy of the purchaser, if any, he has not succeeded to plaintiffs' claim, and the positions of the two are not inconsistent.

It is suggested that plaintiffs must redeem before they can maintain this action. In case of redemption the money would go to Heyderstaedt, and the city would act only as the agent to pay it over, and the only effect such action would have upon plaintiffs would be to change the nature of the payment by substituting the money in place of the lot. In either case the city would receive the money, and the plaintiffs pay it. The order is reversed.

FINNICAL

v.

VILLAGE OF CADIZ.

(*Supreme Court of Ohio, Jan. 9, 1900.*)

Violation of Ordinance—Practice—Statute.—Cases for the violation of village ordinances sent to the court of common pleas in pursuance of section 1827, Rev. St., should be tried in that court upon the affidavit filed before the mayor. Indictment of the accused is neither necessary nor proper.

(Syllabus by the Court.)

ERROR by defendant to Harrison county circuit court. *Affirmed.*

Albert O. Barnes, for plaintiff in error.

D. A. Hollingsworth and *P. W. Boggs*, for defendant in error.

PER CURIAM. By section 1823 of the Revised Statutes final jurisdiction is conferred on mayors of villages "to hear and determine any prosecution for the violation of an ordinance of the corporation, unless imprisonment is prescribed as part of the punishment." "Where imprisonment is a part of the prescribed punishment, and the accused does not waive a jury," the mayor "may summon a jury, and try the accused," and in such case judgment shall be rendered in accordance with the verdict, unless a new trial, for sufficient cause, is granted. Section 1826. But, in such cases, by the provisions of section 1827, the mayor may decline to summon a jury and try the accused, "if, in his opinion, the public interest will be thereby promoted, and, in that case, the mayor, having entered that fact on his docket, may proceed to inquire into the complaint, and discharge the accused, recognize him to the court of common pleas, or commit him in default of bail; and in such case the court of common pleas shall have jurisdiction of the offense." The mayor in this

case proceeded under and in accordance with this last section, and took the recognizance of the accused conditioned for his appearance at the next term of the court of common pleas, where, as has already been stated, the case was placed on the trial docket. There appears to be no express provision made by statute with respect to the mode of proceeding and trial in such cases in the court of common pleas, and it is the claim of the plaintiff in error that the same mode of proceeding and trial must be had as in criminal cases; that is, by indictment. This claim is obviously without foundation. There is nothing in the constitution which secures the accused that mode of trial. An indictment is necessary only in capital or otherwise infamous crimes, and is not required in cases of inferior offenses,—those where the punishment is less than imprisonment in the penitentiary. Const. art. 1, § 10; Dillingham *v.* State, 5 Ohio St. 280, 282. Nor have we been able to find any statute which provides for indictment for violation of municipal ordinances. The offenses which it is the duty and province of the grand jury to inquire into and present by indictment are those only that are violations of the criminal laws of the state. Prosecutions for these offenses are required to be in the name and by the authority of the state, and the indictment must "conclude against the peace and dignity of the state." Const. art. 4, § 20. These provisions seem incompatible with prosecutions by indictment for offenses against municipal ordinances, which are carried on in the name and for the benefit of the corporation. Where such cases are certified to the court of common pleas under section 1827, the proper course to pursue is to proceed to trial upon the affidavit filed before the mayor. That constitutes a sufficient information. The object of the provision for sending cases of that kind to the court of common pleas is to afford the accused better opportunity of having a trial by an impartial jury, with proper instructions from the court, and a judgment unbiased by local influences, if he is found guilty. Judgment affirmed.

STATE *ex rel.* ATTORNEY GENERAL

v.

ORR.

(*Supreme Court of Ohio, Dec. 19, 1899.*)

City Council — Membership — Vacancy — Municipal Powers. — A municipality has power to provide by ordinance that a member of council who removes without his ward shall be deemed to have resigned his office.

Same—Same—Same.—The fact of removal being conceded, the office may be regarded and treated as vacant, and the number of members of council thereby reduced accordingly.

Same—Quorum.—Where there is such a vacancy, a quorum will consist of a majority of all the members elected and remaining qualified.

(Syllabus by the Court.)

QUO WARRANTO by the state. *Petition dismissed.*

F. S. Monnett, Atty. Gen., *A. C. Buchanan*, and *George S. Long*, for plaintiff.

C. B. Jamison and *R. A. Harrison*, for defendant.

PER CURIAM. Section 1680, Rev. St., provides that "a member of the council or board of aldermen must be a resident of the corporation for which he is elected, and if the corporation is divided into wards or districts, then a resident of the ward or district for which he is elected." This seems to mean that a member of council must be a resident of his ward, not only when elected, but also that he must remain such resident; and then the statute is supplemented by the ordinance of the city, which provides that a councilman who removes without his ward shall be deemed to have resigned his office. It being conceded in this case that Mr. Crow had removed out of his ward, it must follow that he thereby ceased to be a

City Council—Membership—Vacancy—Municipal Powers.

Same—Same—Same.

member of the council, the same as if he had resigned. After such removal and failure to fill the vacancy, the council consisted of only nine members, only that number having been elected. Section 1675, Rev. St., provides that "a majority of all the members elected shall constitute a quorum for the transaction of business." Five being a majority of nine, it follows that a quorum was present, and that Mr. Orr was elected president of the council by a majority of all the members elected to the council, and that his election was therefore valid. Demurrer to the answer overruled, and petition dismissed.

Same—Quorum.

COMSTOCK *et al.*

v.

INCORPORATED VILLAGE OF NELSONVILLE *et al.*

(*Supreme Court of Ohio, Dec. 19, 1899.*)

Improvements—Liability—Statute.—Unless a valid exception is made by some provision of statute, section 2702, Rev. St., is applicable to so much of the cost and expenses of a street improvement as is to be paid by the municipality out of funds arising from a levy on the general tax list.

Same—Same—Same—Local Assessments.—Said section is not applicable to so much of the cost and expenses of a street improvement as is to be paid by an assessment on the property bounding and abutting on such improvement or adjacent thereto.

Same—Contractors' Certificates.—Whether the certificate required by said section 2702 has been filed and recorded or not must be ascertained by each contractor for himself, at his peril. In the absence of such certificate, when required, no liability arises against the municipality, even though the contractor has fully performed his contract.

(Syllabus by the Court.)

ERROR by plaintiff to Athens county circuit court. *Reversed.*

Comstock *v.* Incorporated Village of Nelsonville

Case Stated.

A petition in proper form, and signed by more than two-thirds of the owners by the front foot of the property abutting on Chestnut street, in the incorporated village of Nelsonville street, between the east side of Fourth street and the west side of Grosvenor street, was presented to the council of the village, praying for the improvement of that part of the street by grading, draining, constructing a curb on each side of the roadway, and paving the roadway with brick or block, with the necessary foundations and gutters, and asking that the cost and expenses of the brick or block and curbing be levied and assessed upon the bounding and abutting property, and that all other expenses of the improvement be paid by the village. The council, by a vote of two-thirds of its members, passed a resolution in proper form on the 7th day of June, 1898, in which it resolved that the council deemed it necessary to improve said part of Chestnut street by excavating, grading, preparing foundations, constructing a curb on each side, and paving with brick or block, in accordance with plans, profiles, and specifications on file in the office of the village clerk, and that the cost and expenses of the brick or block and of the curbing be assessed by the front foot upon the lots and lands bounding and abutting upon the improvement, and that all other cost and expenses of the improvement be levied on the general tax list of the village, and that bonds be issued in anticipation of the collection of the assessments. On July 13, 1898, the council passed an ordinance in which it ordained that the improvement of said part of Chestnut street be proceeded with in accordance with the above resolution, and that the cost and expenses of the improvement, less the labor, and less such further portion as the said council might levy on the general tax list, be assessed by the foot front upon the lots and lands bounding and abutting upon said improvement. The council published notice for bids, and awarded the contract for making said improvement to John F. Welch and Abner Juni-

per, who proceeded with the improvement under their contract.

After the contractors had partly completed the improvement, the plaintiffs in error, taxpayers in said village, commenced an action against the village, its mayor, clerk, and councilmen, and against said contractors, setting out in their petition the foregoing facts, and in addition thereto averring that said village had no solicitor, and then continued in their amended petition as follows: "Said village has not appropriated or otherwise acquired any lots or lands for the purpose of laying off, opening, extending, straightening, or widening said part of said Chestnut street, and said village is not possessed of any property which it desires to improve by the improvement of said part of said street. At the time of the passage of the resolution by the council, to wit, on June 7, 1898, there was not in the treasury of said village, and never has been, money to pay for said improvement of said street, or any part thereof. And the clerk of said village never at any time certified to said council that the money, or any part thereof, required to pay for said improvement of said street, was in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose. The said mayor and clerk have signed on behalf of said corporation negotiable notes and certificates of indebtedness, and the same have been delivered in payment of a large proportion of the cost and expenses of said improvement; and said council intends to issue bonds of said village in payment of said cost and expenses, or a large portion thereof. And said council has not made any assessment of any kind upon the lots and lands abutting and abounding on said part of said street, and has made no assessment of any kind or character whatever to pay the cost and expenses of said street. No levy of any kind has been made on the general tax list for the proportionate share contemplated by said resolution to be paid by said village. The said council on the 1st day of November, 1898, directed the clerk of said village to draw an order on the general street

fund of said village for the payment of the cost of the improvement of said part of said Chestnut street, and the said clerk has drawn said order, and there has been paid out of said general street fund over one thousand dollars; and the said council will, if not enjoined by this court, expend all the money in said general street fund for said improvement. Said council will, if not enjoined by this court, take from said general street fund whatever money is collected there hereafter by taxation, and appropriate and use the same for the payment of the cost and expenses of said Chestnut street improvement. The money in said general street fund was not collected by taxation for the purpose of improving said part of said Chestnut street, and was not collected or appropriated for the improvement of any street in said village under the street assessment laws of Ohio. Said council will, if not enjoined by this court, make a levy and place an assessment upon the general tax list of said village to pay a great part of the cost and expenses of said Chestnut street improvement. The defendants are misapplying the funds of said corporation, and, if not restrained by this court, will abuse the corporate powers of said corporation, as above set forth. Wherefore plaintiffs pray that they may have a temporary restraining order, and, upon the final hearing of this cause, a perpetual injunction, enjoining said council, said mayor, and said clerk, and said village of Nelsonville, Ohio: First, from levying and assessing upon the real and personal property of said village of Nelsonville, Ohio, returned on the grand levy, an assessment and levy for the payment of the cost and expenses of said Chestnut street improvement, or any part thereof; second, from paying the negotiable bonds, notes, and certificates of indebtedness of said village of Nelsonville, Ohio, heretofore issued to pay the cost and expenses of said Chestnut street improvement; third, from drawing orders upon, and taking out of the general street fund of said village of Nelsonville, Ohio, money with which to pay the cost and expenses of said Chestnut street improvement, or any part thereof,—and for all other relief to which they may be entitled."

To this amended petition the defendants filed the following demurrer: "Now come the defendants, and severally and jointly demur to the amended petition of the plaintiffs, for the reasons: First, that there is a defect of parties defendant; second, that several causes of action are improperly joined; third, that the petition of the plaintiffs does not state facts sufficient to constitute a cause of action."

The court of common pleas overruled this demurrer, and, the defendants below not desiring to plead further, judgment was rendered against them, to all of which they duly excepted. No ruling was made as to the right of the council to make an assessment upon the abutting property to pay the cost and expenses of the improvement, and that question is not here. Upon petition in error the circuit court held that the common pleas erred in overruling the third paragraph of the demurrer to the amended petition, and upon that ground alone reversed the judgment, and remanded the cause to the court of common pleas for further proceedings accor ding to law, to all of which exceptions were taken. Thereupon the plaintiffs below filed their petition in error in this court, seeking to reverse the judgment of the circuit court, and asking that the judgment of the court of common pleas be affirmed.

Lewis & Sayre, for plaintiffs in error.
Grosvenor, Jones & Worstell, for defendants in error.

BURKET, J. (after stating the facts). The judgment of the circuit court is that the amended petition does not state facts sufficient to constitute a cause of action, and that there is no other error in the record. We think that the circuit court was right in finding no other error in the record, and will therefore consider only the question as to whether the petition states facts sufficient to constitute a cause of action. If section 2702, Rev. St., known as the "Burns Law," is applicable to the case, the petition states a good cause of action, and the other questions so ably argued by counsel become of little importance.

The proceedings of the council show that the cost and

expenses of the brick or block and curbing were to be assessed upon the bounding and abutting property by the foot front, and all the other costs and expenses of the improvement were to be levied upon the general tax list of the village. The "other costs and expenses" included all except the cost of brick, block, and curb, and the materials and labor included in these other costs and expenses formed a part of the contract for the whole improvement awarded to said John F. Welch and Abner Juniper; and by that contract the village agreed to pay them a certain sum of money for the whole improvement, including these other costs and expenses. This agreement to pay the contractors for all of the improvement not included in the brick, block, and curb, out of a levy on the general tax list of the village, involved an expenditure of money which could only be raised by such a levy, and the same was therefore included in those agreements which are prohibited by said section 2702. The section is general in its terms, but the object of the general assembly evidently was to compel municipalities to have the money in the treasury before appropriating or spending it. This can only apply to money raised, or to be raised, by a levy on the general tax list of the municipality. If the money is to be provided in the first instance by taxation, it must be collected and in the treasury before it can be appropriated or expended either by ordinance, resolution, order, contract, agreement, or other obligation. If bonds are issued and sold, and the money provided in that manner, the bonds to be paid by a levy on the general tax list, money arising from the sale of such bonds must be in the treasury before it can be expended, the same as if it had been raised by taxation in the first instance. In all such cases said section 2702, is applicable, unless there is an exception by some other provision of the statute; and, when that section is applicable to any particular case, no liability can arise, as against the municipality, unless the certificate required by the section shall be first filed and recorded, and whether the same has been so filed and recorded must be ascertained by

Improvements—Liability—Statute.

all contractors for themselves at their peril. City of Lancaster *v.* Miller, 58 Ohio St. 558, 51 N. E. 52; McCloud *v.* City of Columbus, 54 Ohio St. 439, 44 N. E. 95; Bridge Co. *v.* Campbell, 60 Ohio St. 406, 54 N. E. 372. A municipality is not estopped from availing itself of the provisions of this section to defeat a claim brought against it, when the section has been violated, even though the contractor has performed his work. In such cases the contract, as well as what is done thereunder, is void as against the municipality.

Same—Contractors' Certificates.

In cases of street improvements, the course of procedure is usually about as follows: A resolution is passed by the council to the effect that it deems it necessary that a certain named street should be improved in a certain manner; the cost and expense to be assessed in whole or in part upon the property bounding and abutting thereon, or adjacent thereto. After notice and other proceedings, an ordinance is passed to the effect that the improvement be made as provided in the resolution, plans, specifications, etc. The improvement is then advertised, bids received, and a contract made for the completion of the improvement. This bid, and the contract made thereunder, for the first time enable the council to ascertain the cost and expense of the improvement. With the cost and expense thus fixed, the council at the proper time makes an assessment of the amount to be paid by the property holders upon their property, and pays the balance out of money in the treasury raised by taxation, or by sale of its bonds; the bonds to be paid by a levy on the general tax list. Some of the property owners pay their whole assessment at once, and that money is paid over to the contractor. Others fail to pay, and for the amounts of their assessments, with the interest thereon, the municipality issues and sells its bonds, and pays the money to the contractor, and pays the bonds out of the assessments, when collected. In such a transaction, the only money which the municipality pays out of its treasury, of money raised

Same—Same—Same—Local Assessments.

by levy on the general tax list, is so much of the cost and expense of the improvement as is not assessed against the property holders; and as to that part said section 2702 is applicable, and must be complied with, in order to make the municipality liable for such part of the cost and expense. As to the part of the cost and expense to be assessed against the bounding, abutting, or adjacent property, said section does not apply, and, in the nature of the case, cannot apply, because if is impossible for the council to ascertain the amount of money required until after it knows who has paid and who has failed to pay his assessment; and by that time a large part, if not all, of the cost and expense will have been incurred. It does not apply for the further reason that by necessary implication said section has reference to money of the municipality (that is, money raised, or ultimately to be raised, by a levy on the general tax list), and does not cover or refer to money of individuals (that is, money to be raised by an assessment upon the property along the improvement). The municipality is limited and restrained by this section as to the expenditure of its own money, but not as to the money of others. As to such assessments, it is competent for the contractor to agree to take the assessments in payment for his labor and materials, and collect the same as provided by law; and, if he does so, the money never goes into the treasury, and no certificate can be filed as to the same. It is therefore clear that, as to the expenditure of money to be raised by such assessments, section 2702 is not applicable. This holding protects the treasury and the general taxpayer, and at the same time enables needed local improvements to be made without detriment to the municipality, and is in accordance with the intention of the general assembly in passing the Burns law. The case of City of Cincinnati *v.* Holmes, 56 Ohio St. 104, 46 N. E. 514, known as the "Avondale Case," is in line with this holding. It was not held in that case, as argued by counsel for the defendant in error, that the Burns law does not apply to any part of the cost and expense of street improvements; but the

holding was that the special acts under which the improvements were made in that case, and which had been previously held constitutional by this court, were to be read as an exception to the Burns law, and that for that reason alone the statute did not apply in that case. The Burns law being one of a general nature, it is doubtful whether exceptions of a local nature can be constitutionally made thereto. Judgment of the circuit court reversed, and that of the common pleas affirmed.

ARBUCKLE-RYAN CO.

v.

CITY OF GRAND LEDGE.

(*Supreme Court of Michigan, Dec. 30, 1899.*)

Municipal Corporations—Contracts Exceeding Limit of Indebtedness—Burden of Proof.*—As the contract was within the general powers of the common council of the city, in an action on the contract against the city, the burden of proof was on defendant to show that the obligation arising out of the contract would exceed the amount fixed by its charter as its limit of lawful indebtedness; and such burden was not sustained.

ERROR by defendant to Eaton county circuit court. *Affirmed.*

The city of Grand Ledge, through its proper officers, on the 23d day of June, 1896, in pursuance of a resolution unanimously adopted by the common council on the same day, entered into a contract with the Chase Construction Company, of Detroit, Mich., by the terms of which contract the construction company, in consideration of the sum of $2,650 and certain used machinery, agreed to furnish one Russell engine, the same to be paid for within 30 days after it had been set, and tested and

*See Reynolds *v.* City of Waterville (Me.), 1 Mun. Corp. Cas. 174 and *note*.

approved by the city electrician. The engine was furnished, was worth the contract price, and was accepted by the common council November 17, 1896. The city has paid on the contract $650 in cash and the specified used machinery. After the engine had been accepted, further time for payment was asked and granted. The city thereupon gave an order to the company, said order being for the sum of $2,000, with interest, and payable out of the electric fund. The construction company, December 16, 1896, assigned its interest in the contract and order to plaintiff, the Arbuckle-Ryan Company. The balance of the purchase money has not been paid, and was past due at the time suit was commenced. Defendant has the engine, has used it since acceptance, and has not tendered performance by payment, nor offered to return the engine. When the contract was made, the city had installed and was operating an electric lighting plant, by means of which it lighted the streets and furnished lights to the inhabitants. It was necessary to secure a new engine for the further safe operation of this plant, and for more power. By the charter of the city of Grand Ledge the common council is limited to a tax of not to exceed 1 per cent. on the assessed value of all the real and personal property in the city made taxable by law. The city taxes of Grand Ledge are spread upon a roll which goes to the clerk in July of each year. The estimates must be made in May, and must be adopted by the common council at the first regular June meeting in each year. Before the contract in question was made, the taxes for 1896 had been voted, and assessed at the sum of $7,800 for the following purposes: For outstanding indebtedness, $5,000; for interest on same, $500; for electric lighting purposes, $1,400; for officers salaries, $400; for bridge fund, $500. At the time the contract was made, the floating indebtedness was about $4,000, $3,000 of which was not due until May, 1897. The assessed valuation for Grand Ledge in 1895 was $755,774; for 1896, $772,065; for 1897, $742,500. The amount of taxes levied in 1895 was $3,000; in 1896, $7,800;

and in 1897, $7,533. The amount yearly expended, including the interest account on the bonded and floating indebtedness, and not taking into account the expense or income of the water and electric lighting plants, would be not far from $3,000 for each of the years 1895, 1896, and 1897. When the order in suit was issued, December 15, 1896, the floating indebtedness had increased from about $4,000 in the June preceding to about $7,000, and no part of the $4,000 had been paid out of the estimates made for taxation for the year 1896. At the time of the estimate in June, 1897, the city owed about $7,000 floating indebtedness, of which $3,000 did not become due until June 1, 1900, and $2,000 until October 20, 1898. This suit was brought to recover on the above order. Judgment for plaintiff for $2,158.30 and costs.

Cassius Alexander (*S. L. Kilbourne*, of counsel), for appellant.

Clark & Latting (*Russell C. Ostrander*, of counsel), for appellee.

GRANT, C. J. dissenting (after stating the facts). The contract which is the real basis of this suit is attacked as void because not within the power of the council to make. Counsel do not disagree as to the law. The following propositions are so well settled that the citation of authorities is unnecessary: (1) The agents of municipal corporations are limited to the power expressly conferred, or necessarily implied. (2) Parties dealing with municipal corporations through their agents are conclusively presumed to know the law, and deal with them at their own risk. (3) When the charters of municipal corporations limit their agents to a certain rate of taxation, contracts in excess of that rate are void. The question therefore becomes substantially one of fact, *viz.*: Did the estimates adopted by the common council prior to the making of this contract include it, or was there any money voted which could properly be used for that purpose? There is nothing on the record to show that at the

time these estimates were made in May, and adopted in June, the purchase of this engine had even been suggested or contemplated. The amounts then adopted were up to the limit of taxation. The purposes for which the amounts were raised were well defined. The sole amount raised for electric lighting purposes was $1,400. All the rest was for outstanding indebtedness, interest on same, salaries, and bridge fund. Clearly, this amount was not included in the estimates, and no taxpayer or member of the council had anything before him to inform him that any such action was then contemplated. We think it impossible to reasonably reach any other conclusion than that the amount provided by this contract was in excess of the limit imposed by the charter for taxation. The result showed that this was so, because, when the contract was completed, there were no funds with which to pay, and an order was given, payable out of the electric fund. The common council had no power to take funds voted for one purpose and apply them to another. The charter provided the proper method for the council to proceed, *viz.* to borrow the money for the purchase of the engine and boiler, provided the electors should authorize it. Loc. Acts 1893, p. 889, c. 22, § 13. If plaintiff's assignor, at the time of entering into the contract, had taken the trouble to examine the records of the common council, it would have discovered the facts above set forth, and that there was no money on hand, and no provision for raising any funds, to meet this extraordinary expenditure. The action cannot be defended upon the ground that it was necessary for the safety of the workmen, or to supply the city with light. Common councils are not vested with authority to determine the necessity of expenditures which are beyond their power to incur. If they desire to exceed the limit, they must appeal to the electors under the charter.

This is not a case for the application of the doctrine of estoppel, in support of which counsel for plaintiff cites Nelson *v.* Mayor, etc., 63 N. Y. 535. In that case the materials furnished exceeded the limitation, and the court expressly

held that contracts in excess thereof were void, but permitted a recovery upon the ground of a subsequent act of the legislature authorizing the transaction. Nor is it within the principle enunciated in Coit *v.* City of Grand Rapids (Mich.) 73 N. W. 811, where it was held "that mere irregularities of action, not going to the essentials of the power, are not sufficient to defeat the exercise of the power." There was, in the present case, an absolute want of authority to enter into the contract, because the limitation of taxation had been reached. Trump Mfg. Co. *v.* Village of Buchanan (Mich.) 74 N. W. 466. The language of JUSTICE SWAYNE, in Railway Co. *v.* McCarthy, 96 U. S. 267, 24 L. Ed. 695, that "the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice," was not applied to municipal corporations, but to private corporations. The defendant railway company had agreed with the plaintiff in that suit to transport cattle from East St. Louis to Philadelphia over other lines than its own, and the defense was that the contract was *ultra vires*. It is not surprising that that language was used, so entirely applicable to the defense in that case. But does it apply to a municipal corporation which can exercise only the powers expressly or by necessary implication conferred upon it? Are these limitations, placed by the people for their protection upon the powers of a municipal corporation, to be abrogated on the ground that the corporation, has had the benefit of the contract, and therefore the people are estopped to assert its invalidity? Probably a large proportion of *ultra vires* contracts on the part of municipal corporations could be sustained if this rule were adopted. In the case of Coit *v.* City of Grand Rapids we said: "If we conceded the premises assumed by defendant, namely, that the contract was wholly *ultra vires*, we might be compelled to reach the conclusion that the city could not be estopped to set up its invalidity." The contract in that case was within the power of a municipality to make. Its action was merely irregular, and it is not

necessary here to comment further upon it. When a certain limit of taxation is reached, the charter absolutely prohibits the making of contracts or incurring obligations beyond that limitation, and every such contract is wholly *ultra vires*. By no other holding can this wise provision of the law be given any effect. If the common council in this case could have made a contract for $3,500, it could just as well have made one for $35,000. The law absolutely enjoins the power when the limit is reached. In Wilkins *v.* Mayor, etc. (Com. Pl.) 30 N. Y. Supp. 424, the city entered into a contract with the Staten Island Rapid-Transit Company under a lease of a certain ferry, by which the company agreed to make extensive and valuable improvements of a permanent character upon the wharf. These improvements had been authorized by a board of commissioners. The improvements were made. By the terms of the agreement the company were, upon certain conditions, to be reimbursed for these permanent improvements. It will be observed in that case that the improvements had been authorized by the proper municipal authorities, but the city had no authority to get the improvements made as was done under the terms of the lease with the ferry company. Strictly speaking, therefore, the contract was *ultra vires*, but the very thing to be done had been authorized. It was the method of doing, not the act, that was *ultra vires*. Many cases similar to this can be found, where the courts have applied the doctrine of estoppel to those contracts which are technically *ultra vires*, but which have been carried out, and of which the municipality has received full benefit. But do such cases apply to contracts and indebtedness incurred in direct violation of the charter of a municipality? It would be a dangerous doctrine to establish that a municipal common council could enter into contracts with those who are always anxious to sell their goods, and then estop the municipality from contesting the validity of the contract, on the ground that it has had the benefit of it. To say that the contract was within the apparent power of the council is not, in my judgment, correct.

Have parties dealing with a municipal corporation the right to rely upon an apparent power in its agent the common council, whose power is limited by the charter? What is an apparent power? Is it such as may be implied from a general agency? But do municipalities have general agents who are presumed to be acting within the scope of their authority? Certainly not. It must follow that there is no apparent power upon which one may rely, but only the real actual power, lodged in the municipality by the charter. Its charter is the sole guide which all are held to know. To that alone parties must look and act at their peril. If the council refuses to tender back the property under such an illegal contract, the law provides a way for the party to regain possession of it. If he suffers some loss in so doing, he cannot complain, because he should have made an examination into the authority of the council.

After writing the above, two rearguments were ordered on the following questions: (1) Was the amount of the order included in the tax budget of 1897? (2) If so, was this a valid ratification of the contract? (3) Does the record show that there was no money in the treasury when the contract was made, which might have been appropriated in payment thereof? The case was tried upon the theory that there was no money in the treasury out of which it could have been paid, and upon that theory was argued in this court. Counsel for plaintiff do not now contend that there was. There is nothing in the record to indicate that the amount was included in the budget of 1897. We need not, therefore, discuss the question of ratification. The burden of proof was upon plaintiff, and it has failed upon both of the above questions of fact. Judgment should be reversed, and new trial ordered.

MONTGOMERY, J. I am for affirmance. The contract between the city and the Chase Construction Company was within the general powers of the common council. It was not, in its nature, *ultra vires*. If the condition of the city

finances was such that the obligation arising out of the contract would exceed the amount which the common council was authorized to incur an obligation to expend, it was incumbent on the defendant to make that fact affirmatively to appear. It does not appear in the findings. It does not appear in the testimony. On the contrary, it does appear that $1,400 was provided in the budget for the electric lighting fund. This sum, it is true, was less than the sum required, but there is nothing to show that there were not sufficient funds in hand, either in the lighting or general fund, or both, to supplement this $1,400, and meet the obligations. It does not appear that, if the Chase Construction Company had investigated the condition of the treasury, they would have found no money on hand. The record is silent on this point. True, at a later date, when an order was issued, the electric light fund had been depleted until it showed but $1,362.54, but I discover no data in the record from which the condition of this fund on the 23d of June, 1896, can be determined. We should indulge in no presumptions of official wrongdoing in favor of a defense so unconscionable as that attempted in this case.

HOOKER and MOORE, JJ., concurred with MONTGOMERY, J. LONG, J., took no part in the decision.

CHICAGO GENERAL ST. RY. CO.

v.

ELLICOTT *et al.*

(*Circuit Court, N. D. Illinois, N. D., July 5, 1898.*)

Street Railways—Extension of Wires—Municipal Control.—Where a street railway company has no permit to use its feed wires for the purpose of distributing power to private consumers, the city, without infringing upon any of the company's rights under the constitution and laws of the United States, may prevent the company from doing so by cutting the connecting wires extended by the company without authority from the city.

Chicago General St. Ry. Co. *v.* Ellicott

Glenn E. Plumb, for complainant.

Samuel A. Tyande, Asst. Corp. Counsel, for defendants.

GROSSCUP, District Judge (orally). The bill in this case is to restrain the defendants in the city of Chicago, Carter H. Harrison, its mayor, and E. B. Ellicott, its electrician, from cutting the wires of the complainant carrying the electrical current from the complainant's generator to the private motors in the lumber district of the city of Chicago. The facts essential to the determination of the motion for an injunction may be stated as follows:

The Chicago General Street-Railway Company is organized under the laws of Illinois for the purpose of constructing and operating a heating, lighting, and power-supply system within the present or future limits of the city of Chicago. The Chicago General Railway Company, a corporation organized to construct, maintain, and operate a street railway, came into possession of the property and the franchises of the West Chicago Railway Company, among which franchises was a permit from the city to construct and maintain overhead wires for the purpose of the operation of said road. On or about the 25th of October, 1897, the said Chicago General Railway Company applied to Hon. L. E. McGann, commissioner of public works, for a permit supplemental to the permit by which it was already operating, which application is, in part, as follows:

"This company, as successor to the rights of the West Chicago Street-Railway Company, hereby makes a formal application for a permit to suspend two necessary feed wires from the line of poles now constructed and on the route below described. Such wires to be constructed and maintained for the purpose of supplying electric current to be used for power and heat and light purposes, and with the right to connect the wires herein authorized with the general or power station of said company at Kedzie avenue and 30th street, along the following route."

Thereupon the city of Chicago issued, upon this application, the following permit:

"In pursuance of an ordinance passed by the city counsel February 14, 1895, granting certain rights and privileges to the West Chicago Street-Railway Company on the streets mentioned below, permission is hereby granted to the Chicago General Railway Company (it having succeeded to the said rights and privileges on the streets mentioned) to suspend two feed wires from the line of poles now constructed on Morgan street. * * * This permit is issued and accepted on the condition that the said wires shall be strung in accordance with, and shall be maintained subject to, all the conditions, stipulations, and requirements of the ordinance hereinbefore mentioned, to all orders and ordinances which may be passed by the city council of the city of Chicago pertaining to the same, and to all orders of the said commissioner; and upon the further condition that the said wires shall be used only for the supply, and not for return, current. * * * This permit is revocable by the commissioner of public works at any time for cause."

Prior to this time the complainant had entered into a contract with the Chicago General Railway Company, whereby the latter leased to the former, for the purpose and to the intent that the former might carry on the business provided for in its articles of incorporation,—that is, the business of constructing and operating a heating, lighting, and power-supply system,—the joint use of the poles, feed wires, and electrical appliances along the lines of the former's railway. It does not appear that the foregoing contract was called to the attention of the city at the time the permit was issued, or that the city issued the permit with any reference to the contract between the complainant and the Chicago General Railway Company. After the issuance of the permit, the Chicago General Railway Company suspended the feed wires mentioned in the permit, and thereupon, under its contract with the complainant, these feed wires were used to supply the electric current to the complainant's patrons in the

lumber district. Under the arrangement between the complainant and the Chicago General Railway Company, the former furnished the latter the necessary electrical power for the operation of its railway. It appears that both the trolly wires proper and the feed wires are connected to the generator, but that, to supply to the trolley wire sufficient current at a distance from the generator, these feed wires are used, the complainant utilizing them as well for the purpose of furnishing power to its private patrons, by tapping them at given places along the line. Subsequent to all these things, the city council of the city of Chicago passed an ordinance creating a department of electricity, in which ordinance it was provided, among other things, that no electrical current should be supplied from any trolley line for any purpose whatever to any building, except for lighting the power stations from which current is supplied to such trolley lines. Under the authority colorably vested in the city electrician by this clause of the ordinance, he purposes to cut the complainant's wires, unless it desists from using the feed wires along the trolley lines for the double purpose of furnishing electrical current to the trolley street-car lines and to the private patrons of the complainant. The complainant alleges that this ordinance is invalid—First, because it impairs the obligation of complainant's contract with the state; second, because it deprives the complainant of its property without due process of law; third, that it denies to the complainant the equal protection of the laws; fourth, that as a police regulation the ordinance is void.

The jurisdiction of this court, of course, depends upon whether the conduct threatened by the city is in virtue of an ordinance that contravenes some portion of the laws of the United States. The court has no jurisdiction to restrain a a simple trespass upon the complainant's rights, unless the trespass threatened violates one of his rights under the constitution and the laws of the United States. It may be assumed that the city has no power by ordinance to prevent the complainant from engaging in or carrying on the busi-

ness of furnishing power, heat, and light, as its charter provides, or from furnishing such power, heat, and light, both to street-railway companies and to private consumers. It may also be assumed that any usual, lawful, and authorized means of attaining the benefit of this general power is within complainant's general charter rights, and is constitutionally free from impairment or attack upon the part of the city. A power to furnish heat, power, and light implies the power to adopt the usual and lawful means of attaining that end. But the complainant has no right, under its charter, in the absence of a grant from the city, to erect its poles or string its wires along the streets of the city. The general charter from the state does not carry with it a grant to the use of the streets. The power to give or withhold that grant lies in the city government. I can by no fair interpretation of the transactions between the complainant and the city find any permit to the complainant to go upon the city's streets for any purpose outside of the erection, maintenance, and operation of a railway line. The application for a permit was made by a company operating a street railway only. The language of the application is for a permit to suspend two necessary feed wires from the line of the poles now constructed, and on the route described, to be maintained for the purpose of supplying electrical current to be used for operating, heating, and lighting purposes. The permit granted on this application was to the Chicago General Railway Company, a company operating only a street railway, and included simply the right to suspend the two wires asked for. I cannot assume, from this correspondence, that the city understood that these additional wires were to be used for the conveyance of the electrical current to private consumers. The applicant was a street-railway company, not a company generally furnishing electrical power. The privilege asked made no mention of anything other than the heat, light, and power needed in the operation of the street railway. An application for a permit to string wires to distribute electrical power to private consumers could have been so easily framed

in apt language to cover the purpose required that the absence of such language implies the absence of such purpose. It is not at all certain that the city would have granted these additional rights to the complainant, had they been specifically asked for. It would have implied either larger voltage upon the wires, or a larger number of wires than the operation of a street-railway line demanded. Either increased voltage or increased number of wires are objections, and might, on that account, have been refused. Upon this view of the case, the complainant is without any permit from the city to use these feed wires for the purpose of distributing power to private consumers. The city may, therefore, by ordinance, or any other action, refuse the right of such a use, and may, if necessary, enforce that refusal; at least it is clear that the complainant has no right founded on the constitution or laws of the United States to compel the use of the city's streets for the purposes named, without a permit having theretofore, for that purpose, been granted. For these reasons the motion for an injunction must be denied.

GURNEY

v.

INHABITANTS OF ROCKPORT.

(*Supreme Judicial Court of Maine, Dec. 14, 1899.*)

Defective Highway—Personal Injuries—Notice.*—To render a town liable for injuries received from a defective way, the municipal officers, highway surveyor, or road commissioner must have had 24 hours' actual notice of the particular defect.

Notice.—Knowledge of a cause likely to produce a defect is not actual notice of a defect resulting from that cause.

Same—Drifting Snow.—A heavy fall of snow, which drifts the highways of a town generally, but blows off in spots, is not such

*See generally *notes*, 1 Mun. Corp. Cas. 475 *et seq.*

Gurney *v.* Inhabitants of Rockport

actual notice of a particular drift, from which an injury is received, as the statute requires.

Same—Same.—If knowledge of such storm could be regarded as notice of the condition of the way at the place of the accident, ***held***, that the plaintiff had the same notice of its condition and under the statute, cannot recover, because she had not previously notified the municipal officers of the defect.

(Official.)

REPORT from Knox county supreme judicial court. *Plaintiff nonsuited.*

ARGUED before EMERY, HASKELL, WISWELL, STROUT, and SAVAGE, JJ.

J. H. & C. O. Montgomery, for plaintiff.

C. E. & A. S. Littlefield, for defendants.

STROUT, J. This action is to recover for injuries suffered from a defective way. In the great snowstorm of January 31 and February 1, 1898, the ways of defendant town were "blocked with snow, rendering them impassable, except in places where the force of the wind blew the snow wholly or partly out of spots in the road." The injury occurred on the 4th day of February, on one of the ways which had been greatly blocked by snow. A portion of the way "on each end had been broken out, leaving an unbroken space at one end, of which the plaintiff suffered her injuries." It is admitted that the "selectmen had no actual notice of the alleged defective condition of the road at the place of the accident, unless the storm and its results" constitute such notice. The town had no highway surveyors, no road commissioner, but had contracted with various persons to break out the roads.

The statute imposing upon towns liability for damages for injuries for defective ways requires, as a condition precedent to recovery, that the municipal officers, highway surveyors, or road commissioner of the town shall have had "twenty-four hours' actual notice of the defect or want of repair" (Rev. St. c. 18, § 80); and this court has held that such actual notice must be of the

Defective Highway—Personal Injuries—Notice.

particular defect which caused the injury, and that notice of a cause likely to produce the defect is not sufficient (Smyth *v.* City of Bangor, 72 Me. 249; Pendleton *v.* Northport, 80 Me. 598, 16 Atl. 253; Hurley *v.* Inhabitants of Bowdoinham, 88 Me. 293, 34 Atl. 72; Carleton *v.* Inhabitants of Caribou, 88 Me. 461, 34 Atl. 269). Notice.

At most, the selectmen of defendant town had notice of a cause, the great fall of snow, likely to produce drifts, the defect complained of. But they had no knowledge of the existence of a drift of snow at this particular place. It might have been a spot where the snow was blown off. They, therefore, did not have actual notice of the identical defect which caused the injury. Such notice being a condition precedent to the right of plaintiff to recover, no liability is shown to attach to the town. Same—Drifting Snow.

But, if knowledge of the storm could be regarded as notice of the condition of the way at the place of the accident, plaintiff had the same notice of its condition and under the statute, cannot recover, because she had not previously notified the municipal officers of the fact. Same—Same.

Plaintiff nonsuit.

LYNCH

v.

CITY OF SPRINGFIELD.

(*Supreme Judicial Court of Massachusetts, Oct. 20, 1899.*)

Negligence of Water Department Employee—Personal Injuries—Liability of City.*—Where a city, in carrying on its water department, is engaged in a work voluntarily undertaken by it, partly commercial in character, and for which it receives pay from those making

*See generally City of Omaha *v.* Croft *et al.*, *ante*, and *notes*.

use of it, it is liable for injuries caused by the negligence of one of its employees while engaged in the necessary business of the water department.

EXCEPTIONS by defendant from Hampden county superior court. *Exceptions overruled.*

J. B. Carroll and *W. H. McClintock*, for plaintiff.
E. H. Lathrop, for defendant.

LORING, J. The plaintiff, while riding a bicycle, was injured by a collision with a horse and wagon belonging to the water department of the defendant city. There was conflicting evidence as to due care on the part of the plaintiff and negligence on the part of the driver of the horse and wagon. It appeared that the water department of the defendant city was created by statute, and was managed by commissioners elected by the city council; that municipal bonds had been issued to pay for the construction of the works, and that these bonds were not yet due; that water was furnished to the inhabitants at fixed rates, paid for by consumers, and collected by the tax collector of the city; that all these bills of the department were paid when approved by the auditor and mayor of the city, and that no money was paid or bills collected by the commissioners. These rentals were used, first, in paying the expenses of conducting the works, and the surplus, if any, in making a sinking fund for the payment of the water bonds. In the year 1896, in which the accident occurred, there was a surplus net from the operation of the water department amounting to $31,011.72. It further appeared that at the time of the accident the horse and wagon in question were in charge of an employee of the water department, whose wages were paid by the city treasurer from receipts of the water department, and that this employee was engaged in the necessary business of the water department. The presiding justice refused to give the following rulings, which were asked for by the defendant:

"The defendant city cannot be held to be engaged in a commercial enterprise because of the maintenance of a public water supply solely for domestic and fire purposes, managed by a board of water commissioners who are elected by the city council, and charging the citizens rentals for the use of said water.

"The maintenance by the defendant of its system of public waterworks for the use of the public, and for fire and domestic purposes, for the construction of which a debt exists, and a sinking fund for the payment thereof, which is provided for by the income from rentals for the use of said water, is not an engagement on the part of the city in a commercial enterprise, such as would render the city liable in this action.

"Upon the evidence, the plaintiff cannot recover."

The defendant city, in carrying on its water department, was engaged in a work voluntarily undertaken by it, partly commercial in its character, and for which it received pay from those making use of it. That the city is liable for injuries caused by the negligence of one of its employees while engaged in the necessary business of that work has for a long time been established to be law in this commonwealth. Hand *v.* Inhabitants of Brookline, 126 Mass. 324; Hill *v.* City of Boston, 122 Mass. 344, 359; Tindley *v.* Salem, 137 Mass. 171, 172; Powers *v.* City of Fall River, 168 Mass. 60, 46 N. E. 408. Exceptions overruled.

AFFLICK

v.

BATES, TREASURER.

(*Supreme Court of Rhode Island, May 1, 1899.*)

Leaving Explosives Unguarded—Negligence.—It is not negligence in a city to leave its tool chest containing explosive caps open and unguarded so that access to the caps can be had by mischievous boys.

Same—Same—Personal Injuries—Proximate Cause.—Even if it is negligence in a city to leave its tool chest containing explosive caps open and unguarded so that access can be had to it by mischievous boys, the act of a boy in exploding a cap he had taken therefrom is the proximate cause of an injury resulting from the explosion, intervening between the negligence of the city and the injury and breaking the causal connection between them.

EXCEPTION by plaintiff. *Judgment on decision.*

Hugh J. Carroll, for plaintiff.
James L. Jenks, for defendant.

MATTESON, C. J. The case shows that the explosive caps, by one of which it is alleged the plaintiff was injured, were kept by the city of Pawtucket in a large tool chest, which stood upon a vacant lot. The caps themselves were inclosed in a box contained in a tin box, the cover of which was secured by a string. The tin box was placed on a shelf near the bottom of the tool chest. Shortly prior to the accident, somebody—it does not appear who—had opened the tool chest, and removed the string from the tin box, and taken out of the box within it some of the caps. The plaintiff and his brother, aged respectively 9 and 11 years, with other boys, were playing ball in a yard adjoining the vacant lot where the tool chest stood. The ball with which they were playing was thrown or knocked over the fence into the vacant lot, and

Case Stated.

the plaintiff and his brother went after it, and found two of the caps like those in the tool chest lying on the ground 10 or 12 feet distant from the chest. The plaintiff took one of the caps and his brother took the other. The latter gave his to another boy, named Nolan, 14 years of age, who was playing with them. The Nolan boy placed the cap on the curbstone, and dropped a stone upon it, where upon it exploded with a loud noise. Particles of the exploding cap struck the plaintiff, who was standing a short distance away, and inflicted the injuries for which he sues. The negligence complained of is the leaving of the tool chest open and unguarded, so that access could be had to it by mischievous boys, and the explosive caps kept in it could be removed. Assuming that the cap by which the plaintiff was injured was one of those taken from the tool chest belonging to the city, we do not think that the city was bound to guard against the mischievous and unlawful acts of others in removing the caps, and therefore we do not think that it was guilty of the negligence alleged. Mahogany *v.* Ward, 16 R. I. 484, 17 Atl. 860. But, assuming that it was, the act of the boy Nolan in exploding the cap was, in our opinion, the proximate cause of the injury, intervening between the negligence of the city and the injury to the plaintiff, and breaking the causal connection between them. Mahogany *v.* Ward, 16 R. I. 481, 17 Atl. 860; Carter *v.* Towne, 103 Mass. 507. New trial denied, and judgment entered on the decision of MR. JUSTICE ROGERS for the defendant for costs.

Leaving Explosives Unguarded —Negligence.

Same—Same—Personal Injuries —Proximate Cause.

DAVENPORT

v.

BUFFINGTON *et al.*

(*Circuit Court of Appeals, Eighth Circuit, Oct. 16, 1899.*)

Public Parks—Diversion to Private Uses—Right of Taxpayer to Enjoin.*—A resident taxpayer of a municipality has such an interest in land therein dedicated to the use of the public for park purposes, and held by the municipal authorities for such use, as to enable him to maintain a bill for an injunction to prevent the diversion of the land to private uses.

Demurrers.—A demurrer to the complaint admits the truth of its allegations.

Public Parks—Dedication by Nation—Revocation—Estoppel.—A nation, state, or municipality which dedicates land that it owns in the site of a town to public use for a park is as conclusively estopped as a private proprietor from revoking that dedication, from selling the park, and from appropriating the land which it occupies to other purposes, after lots in the town have been sold, the town has been settled, and the park has been improved with moneys raised by the taxation of its residents and taxpayers in reliance upon the grant and covenant which the dedication evidences.

APPEAL by defendant from Indian Territory, United States court of appeals. *Affirmed.*

This is an appeal from a decree of the United States court of appeals in the Indian Territory, which affirmed a decree of the trial court overruling a demurrer to the complaint, and granting a perpetual injunction against the appropriation of the public parks of Vinita, in the Indian Territory, to private use. This was the case which the appellees presented by their bill: The Cherokee Nation, by a legislative enactment passed on December 14, 1871, reserved a tract of land one mile square at every railroad station upon its lands, and authorized its principal

Case Stated.

*See Douglass *v.* Montgomery (Ala.), 1 Mun. Corp. Cas. 253 and *notes*.

chief to appoint commissioners to locate, survey, and sell the same as sites for towns. These commissioners located, surveyed, and platted a tract of land one mile square as the town of Downingville, where Vinita now stands. By their plat they divided this land into lots, blocks, parks, streets, alleys, and right of way of the railroad company. Then they advertised for sale, and on October 13, 1871, sold, the lots and blocks according to this plat. After completing this sale they filed their plat and their report of the sale, and this plat and sale were duly approved by the national council of the Cherokee Nation. After all this had been done, and in the year 1873, the national council created the mayor and town council of Downingville a municipal corporation, and that corporation took, and has ever since retained, the possession, care, and control of the streets, alleys, and public parks of Downingville under this act of incorporation. It has taxed the property of the residents of that town to raise money to improve these parks, and it has expended money upon them for that purpose. After the mayor and town council of Downingville had held possession and control of these parks for 23 years, and had expended some money upon them in improvements, and on December 4, 1896, the national council of the Cherokee Nation passed a legislative act which authorized the town commissioners of that nation to survey and plat these parks into lots, and to sell them. The judge of the circuit court of Cooweescoowee district enjoined T. A. Chandler, town commissioner, from surveying and selling these parks under this act, but this commissioner proceeded to sell the lots in the park, as though no injunction had been issued against him, in contempt of the circuit court of Cooweescoowee district. The appellant, James S. Davenport, bought one of these lots, and fenced it for the purpose of building a residence upon it. None of the money realized from the sale of these lots in the parks has been paid to, and none of it inures to the benefit of, the mayor and town council of Downingville, under the

act authorizing their sale. The appellee T. M. Buffington is the mayor of Downingville. The appellees J. C. Gray and T. F. Thompson are citizens of the Cherokee Nation, who own lots fronting the park in which the lot purchased by Davenport is situated, and they bought their lots before the national council passed the act of December 4, 1896. The appellee W. H. Tarrant is a resident and taxpayer of the corporate town of Downingville, and a citizen of the United States. These appellees averred that the sale of this park by the town commissioners was illegal, that the appellant thereby obtained no legal right or title to the lot which he purchased and fenced, that the sale and the act of the appellant in fencing this lot constituted a violation of the dedication of the parks to public use and of the rights of the appellees, and entailed much damage upon each of them, and they prayed for and obtained an injunction which prohibited the appellant from constructing a residence on the lot in the park which he had bought, and commanded him to remove the fence which he had built upon it. The grounds of the demurrer to the complaint which stated these facts were that there was a defect of parties plaintiff, and that the facts stated in the complaint constituted no cause of action. The courts below overruled this demurrer, and issued a perpetual injunction.

G. B. Denison and *William T. Hutchings*, for appellant. *Preston S. Davis*, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). When this suit was commenced the tribal courts of the Cherokee Nation had exclusive jurisdiction of all cases arising in the Cherokee country in which members of that tribe by nativity or adoption were the only parties, while the United States court in the Indian Territory had jurisdiction of every civil case arising between a citizen of the United States and any citizen or person residing in the

Indian Territory. 25 Stat. 784, c. 333, § 6; 26 Stat. 94, 96, c. 182, §§ 29, 31; Raymond *v.* Raymond, 28 C. C. A. 38, 83 Fed. 721, 723. All the parties to this suit except Tarrant were members of the Cherokee Nation. If Tarrant had no cause of action against the appellant, then he was not a proper party to this suit, and the United States court was without jurisdiction of it. The defect of parties plaintiff which the appellant urges upon our consideration is that Tarrant was a mere general taxpayer and resident of Downingville, that he had no interest in the preservation of its parks different from or other than that possessed by every other resident taxpayer, and that this was insufficient to enable him to maintain a suit for this injunction. If, however, these parks were dedicated to the public by the Cherokee Nation, as this taxpayer claims, that dedication was made more than 25 years ago, and the town of Downingville has been settled, the lots in it have been sold, and its inhabitants have established their homes there, and have become the taxpayers of the town in reliance upon that dedication. After all this has been done, the nation sells the parks, and its vendee enters upon a portion of one of them, and is about to appropriate it to his private use, and to make it the site for his residence. Has a resident and taxpayer of the municipality no remedy for such a wrong? May the parks which he and his fellow citizens have paid to improve be sold and appropriated to the use of the nation, or of strangers, while he stands by remediless? Has he no interest in the right of the public to the free use of these commons sufficient to enable him to maintain a suit in equity to prevent the destruction of his right to use them, the spoliation of the parks, and their appropriation to private use? Let us see. The title to the land in these parks, subject to the right of the inhabitants and taxpayers of the town to use it forever for park purposes, is without value. It is nothing but a naked legal title held in trust for the people who use, or have the right to use, the parks. The real value of the land in the parks is the value of the right to use it, and

Public Parks—Diversion to Private Uses—Right of Taxpayer to Enjoin.

when the nation sells the parks it derives its purchase price, in fact, not from the sale of the title to the land, but from the sale or the destruction of the right of the people to use that land for park purposes. Thus, by the sale of the parks, the resident taxpayer, Tarrant, is deprived of his share in the valuable right to use them. This is not the only injury entailed upon him by this sale. Parks are, if not necessary, at least customary, possessions of towns and cities; and, if the parks of Downingville are sold and appropriated to private use, the strong probability is that the town will purchase more land, establish other parks upon it in lieu of those destroyed, and thus increase the burden of the appellee's taxation. Again, Tarrant alleges that he has a wife and four children, and that he expects to make Downingville his home, and to raise and educate his children there. If these parks are appropriated to private use, he and his family will be deprived of their use to promote their health, recreation, and amusement. In short, the sale of the parks, and their use by the vendees for their private purposes, will deprive the appellee Tarrant of his share in the valuable right of the people to use them for park purposes, will deprive him and his family of a source of health, recreation, and amusement, and will be very likely to increase the burden of his taxation by compelling him to pay a part of the purchase price of other parks bought to replace those destroyed. Now, the enforcement of trusts is one of the great heads of equity jurisdiction. The land in these parks, if it was really dedicated to the use of the public for park purposes, is held in trust for that use, and courts of equity always interfere at the suit of a *cestui que trust* or a *cestui que* use to prohibit a violation of the trust, or a destruction of the right of user. The appellee Tarrant is one of the *cestuis que* use for whom these parks are held in trust, and the inevitable conclusion is that his interest in them is ample to enable him to maintain a suit in equity to prevent their diversion to private uses. Thus, in Scofield *v.* School Dist., 27 Conn. 499, it was held that a resident and taxpayer of the district had sufficient interest to

enable him to maintain an injunction to prevent the use of the school house for religious services. The court very pertinently said that the value of the right of the district and its inhabitants to the exclusive use of the school house for school purposes was not to be measured by the mere pecuniary injury resulting from an infringement of the right. To the same effect is the decision of the supreme court of Kansas in Spencer *v.* School Dist., 15 Kan. 259, in which the opinion was delivered by JUDGE BREWER. Indeed, under the modern decisions, the general rule is that a resident taxpayer of a municipality has sufficient interest, and has the right to maintain a bill to prevent the unlawful disposition of the money or property of his town or city, to forbid the illegal creation of a debt or liability of his municipality, and to restrain the diversion of money or property in his town or city from any public use in which he shares to which it has been dedicated. Crampton *v.* Zabriskie, 101 U. S. 601, 609; Mayor, etc., *v.* Gill, 31 Md. 375, 395; Spencer *v.* School Dist., 15 Kan. 259; Scofield *v.* School Dist., 27 Conn. 499; Christopher *v.* Mayor, etc., 13 Barb. 567, 571; Stuyvesant *v.* Pearsall, 15 Barb. 244; De Baun *v.* Mayor, etc., 16 Barb. 392; Sharpless *v.* Mayor, etc., 21 Pa. St. 147, 158; Moers *v.* City of Reading, *Id.* 188; City of New London *v.* Brainard, 22 Conn. 552; Merrill *v.* Plainfield, 45 N. H. 126.

The suggestion is made in the brief of the appellant that the only citizens of the United States who could lawfully reside in the Cherokee Nation were school teachers, army officers, and licensed traders, and that consequently, the appellee Tarrant could not have been a lawful resident and taxpayer of Downingville. But there is no presumption that Tarrant was not a school teacher, or an army officer, or a trader, and the demurrer admits that he was a resident and taxpayer of the town. This was an admission that he was a lawful resident, and the payer of a legal tax, and the suggestion in this regard is unworthy of consideration.

Demurrers.

The second proposition of counsel for the appellant is that

the complaint states no cause of action, because the Cherokee Nation had the right to revoke in 1896 the dedication which it made in 1871, and to sell the land dedicated to public parks free from the trust with which it was impressed. The designation of this land as parks or commons on the plat of the town of Downingville, which was accepted and approved by the nation in 1871, was, in legal effect, a grant of the land for the exclusive use of the public for park purposes, and a warranty on the part of the nation, which owned it, that it it would never claim or use it for any other purpose. The purchase of lots in accordance with this plat by the inhabitants and taxpayers of Downingville, and their imposition upon themselves and their expenditure of taxes to care for and improve the parks was an acceptance of this grant and covenant. Bell *v.* Railroad Co., 63 Fed. 417, 419, 11 C. C. A. 271, 272, and 27 U. S. App. 305, 308; Beatty *v.* Kurtz, 2 Pet. 565, 583; City of Jacksonville *v.* Jacksonville Ry. Co., 67 Ill. 540, 542; Le Clerq *v.* Trustees of Gallipolis, 7 Ohio, 218, 221, pt. 1; Village of Princeville *v.* Auten, 77 Ill. 325, 330; Brown *v.* Manning, 6 Ohio, 298. After the mayor and town council of the town of Downingville was incorporated by the Cherokee Nation, and after it took possession and control of these parks, this grant and acceptance became a threefold contract. It was an agreement between the nation and the public,—the people for whose use the title of the parks was held,—an agreement between the mayor and the town council of the town of Downingville and these people, and an agreement between the nation and the municipality; and all parties to this agreement were equally bound to hold and keep the land embraced within these parks sacred to the exclusive use of the public for park purposes. It is not claimed that a private proprietor, who had platted and dedicated land for a park in this way, could lawfully revoke that dedication, and sell the park for private use, after lots had been bought, and the park had been improved in reliance upon the plat. The contention is that the Cherokee Nation

Public Parks—Dedication by Nation—Revocation—Estoppel.

was a trustee for and represented the public, and that its sale of the parks was a lawful release of the right of the public to use them as such by their legal trustee and representative. In support of this view counsel for the appellant cites Clarke *v.* City of Providence (R. I.) 15 Atl. 765, 766, and Commissioners *v.* Armstrong, 45 N. Y. 234. In these cases, however, the state simply authorized the municipalities to appropriate the parks within their limits to other uses. The state did not assume in either case to appropriate a park to its own use, or to sell it for its own benefit, as the Cherokee Nation does in the case at bar; so that these decisions do not rule this case. Moreover, the nation, in the case in hand, is the grantor and covenantor, and upon indisputable principles it cannot be at the same time the grantee and the covenantee, or the agent of such grantee and covenantee, to release to itself the grant and covenant which it has made. McKinley *v.* Williams, 74 Fed. 94, 95, 20 C. C. A. 312, 313, and 36 U. S. App. 749, 752, and cases there cited. Besides, we are unwilling to concede that a nation or a state which becomes the proprietor of a town site, plats it, and dedicates its streets and parks to public use, has any greater or better right to revoke or avoid its grant or covenant than a private proprietor would have. It may be that either, before any rights have accrued, can revoke the dedication, but, after lots have been sold, after streets have been graded, after parks have been cared for and improved according to the plat,—in other words, after rights have vested in reliance upon the dedication,—we deny the right of nation or of individual to revoke it, or to release or destroy the right of the public to the exclusive use of the parks and streets for the purposes for which they were granted. Nations, states, and municipalities have and exercise two classes of powers,—one governmental, by which they rule their people ; the other proprietary or business, by which they carry on their business affairs as legal personalities. The same fundamental principles of justice, of law, and of equity govern them in the exercise of their powers of the latter class which control the acts of pri-

vate individuals. Illinois Trust & Savings Bank *v.* City of Arkansas City, 76 Fed. 271, 282, 22 C. C. A. 171, 182, and 40 U. S. App. 257, 277 and cases there cited; U. S. *v.* Northern Pac. R. Co. (C. C. A.) 95 Fed. 864, 880. When the Cherokee Nation platted the town of Downingville, and when it undertook to revoke the dedication which that plat evidenced, it was not exercising its governmental, but its proprietary or business, powers, and it was subject to the same principles of law and of equity, and to the same rules of estoppel, that would have governed a private proprietor under like circumstances. A nation, state, or municipality which dedicates land that it owns in the site of a town to public use for the purpose of a park is as conclusively estopped as a private proprietor from revoking that dedication, from selling the park, and from appropriating the land which it occupies to other purposes after lots have been sold, after the town has been settled, and after the park has been improved with moneys raised by the taxation of its residents and taxpayers in reliance upon the grant and covenant which the dedication evidences. Monongahela Nav. Co. *v.* U. S., 148 U. S. 312, 341, 13 Sup. Ct. 622; Rutherford *v.* Taylor, 38 Mo. 315, 319; Warren *v.* Mayor, etc., 22 Iowa, 351; Ransom *v.* Boal, 29 Iowa, 69; Price *v.* Thompson, 48 Mo. 361, 365; Commissioners *v.* Lathrop, 9 Kan. 453, 463; McCollough *v.* Board, 51 Cal. 418; Harris Co. *v.* Taylor, 58 Tex. 690, 695. As the Cherokee Nation had no right to take possession of or to occupy the parks in the town of Downingville for the construction of residences in the year 1896, the appellant, Davenport, acquired no such right by his purchase from that nation, and the injunction was rightfully granted. The decrees of the United States court of appeals in the Indian Territory and of the United States court for the Northern district of the Indian Territory are affirmed.

CITY OF LINCOLN

v.

PIRNER.

(*Supreme Court of Nebraska, Feb. 9, 1900.*)

Personal Injuries—Defective Sidewalk—Liability of City where Abutter Is Required to Maintain Sidewalk.—The provision of the charter of cities of the first class requiring real-estate owners and occupants to maintian certain sidewalks, and making them liable for injuries occasioned by reason of the defective condition of such sidewalks, does not relieve such cities from the duty of keeping their streets in good repair and fit for use.

Same—Defective Coal Hole—Notice—Liability of City.*—A city, in the absence of actual notice, is not, ordinarily, liable for failing to discover the existence of a defect in a scuttle hole which had been properly constructed, and was apparently safe and secure.

Same—Same—Liability of City.†—In such case the test of liability is whether the municipal authorities did everything which, under the circumstances, ordinary care and prudence required them to do.

Same—Same—Duty to Search for Defects.—Where an injury was occasioned by a defective sidewalk, an omission of duty is not to be inferred from a failure of the agents and servants of the city to search for defects in the sidewalk, where there was no reason to suppose defects existed.

Instructions.—An instruction relating to a matter submitted to the jury, and which states correctly a proposition of law applicable to the evidence, is not erroneous.

Notice of Injury—Statute.—A statute requiring notice to be given to a city of the time, place, and cause of an injury resulting from an accident for which it may be liable should receive a liberal construction by the courts.

Same.—Such notice is sufficient if the description given and the inquiries suggested by it will enable the agents and servants of the city to find the place where the accident happened.

(Syllabus by the Court.)

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*See generally *notes*, 1 Mun. Corp. Cas. 474 *et seq.*

†See generally *notes*, 1 Mun. Corp. Cas. 58 *et seq.*

City of Lincoln *v.* Pirner

ERROR by defendant to Lancaster county district court. *Affirmed.*

N. C. Abbott, *Joseph R. Webster*, and *John P. Maule*, for plaintiff in error.

Tibbets Bros., *Morey & Anderson*, and *W. E. Stewart*, for defendant in error.

SULLIVAN, J. Mary T. Pirner fell through a coal hole in the sidewalk on P street in the city of Lincoln, and, as a result of the accident, sustained injuries, for which she was awarded damages in an action brought against the city in the district court of Lancaster county. The purpose of this proceeding is to secure a reversal of the plaintiff's judgment. The defendant claims exemption from liability under the following provision of its charter: "It is hereby made the duty of all real-estate owners and occupants to keep the sidewalks along the side or in front of the same in good repair, free from snow, ice and other obstructions, and they shall be liable for all damages or injuries occasioned by reason of defective condition of any sidewalk." The claim that this provision relieves cities of the class to which it relates from the duty of maintaining their sidewalks and keeping them safe and fit for use was fully considered in City of Lincoln *v.* O'Brien, 56 Neb. 761, 77 N. W. 76, and decided adversely to the contention of the defendant.

Personal Injuries—Defective Sidewalk—Liability of City where Abutter Is Required to Maintain Sidewalk.

It is next contended that the court erred in charging the jury on the subject of constructive notice. The law undoubtedly is, as claimed by counsel for defendant, that a city, in the absence of actual notice, is not, ordinarily, liable for failing to discover the existence of a defect in a scuttle hole which has been properly constructed, and is apparently safe and secure. The action being grounded on negligence, the test of liability is whether the municipal authorities did everything which, under the

Same—Defective Coal Hole—Notice—Liability of City.

Same—Same—Liability of City.

circumstances, ordinary care and prudence required them to do; and the rule is that an omission of duty is not to be inferred from a failure to search for defects in a sidewalk, where there is no reason to suppose defects may be found. Cooper *v.* City of Milwaukee, 97 Wis. 458, 72 N. W. 1103; Duncan *v.* City of Philadelphia, 173 Pa. St. 550, 34 Atl. 235; Hanscom *v.* City of Boston, 141 Mass. 242, 5 N. E. 249. The jury were told that, if the scuttle hole in which the plaintiff was injured had remained in a defective condition for such a length of time that the authorities, in the exercise of ordinary diligence, should have discovered the defect, notice to the defendant would be presumed, and proof of actual notice would not be necessary to entitle the plaintiff to recover. This instruction was not erroneous. It imposed no duty upon the city beyond that of ordinary care. It did not, it is true, cover the entire question, but it laid down a correct proposition of law applicable to the evidence, and was not in any respect misleading, especially when considered in connection with the fourth paragraph of the charge, which is as follows: "Negligence is the gist of this action, and the burden of proving the negligence on the part of the defendant city, as alleged in plaintiff's petition, is upon the plaintiff, and, before she would be entitled to recover in this action, she must prove the negligence so alleged in her petition on the part of said defendant by a fair preponderance of the evidence; and in this case, if you find from the evidence that the said scuttle hole in controversy was constructed in such manner as was considered, exercising ordinary reason and prudence, ordinarily safe to persons passing along and over the same, using ordinary care and diligence, or that said scuttle hole became out of repair, and became unsafe and defective, and that said defendant city, through its authorities, had no knowledge of the same, and that such defective condition had not existed a sufficient length of time, or that said defective condition existed in such manner, that by the exercise

Same—Same—Duty to Search for Defects.

Instructions.

of ordinary care and diligence the said defendant city could have known it, then, and in that event, the said defendant city would not be liable, and your verdict should be accordingly." By the instruction quoted the jury were informed in unmistakable terms that, if the defective condition of the coal hole was of such a character that the city authorities could not have discovered it by the exercise of ordinary care, the city would not be liable. In other words, the right of the plaintiff to a verdict in her favor was, by the fourth instruction, made to depend upon the accident having resulted from a defect in the sidewalk which was so evident and open to view that actual knowledge of it must, in the usual course of events, have reached the agents and servants of the city, if they had faithfully performed the duty imposed upon them by law, in seeing that the public streets were safe for those having occasion to use them. The jury, following the instructions of the court, could not have found for the plaintiff without first finding that the defect in the sidewalk was a visible defect,—one which ought to have been discovered and remedied by the city authorities before the accident happened. The conclusion of the jury on this point is a just one. It is an eminently fair deduction from all the evidence in the case.

The only other assignment of error which we shall notice challenges the legal sufficiency of the statement or account of the accident filed by the plaintiff in the office of the city clerk. The statute provides that, "to maintain an action against said city for any unliquidated claim, it shall be necessary that the party file in the office of the city clerk, within three months from the time such right of action accrued, a statement giving full name and the time, place, nature, circumstances and cause of the injury or damage complained of." Section 36, c. 13a, Comp. St. 1899. The notice given by the plaintiff described the place of the accident as being "in front of lot 13, in block 45, on P street, in the city of Lincoln, near the west side of what is commonly known as the 'Carr Block.'" The

Notice of Injury—Statute.

description was in all respects accurate, except that the number of the block should have been 34, instead of 45. Whether there was a block numbered 45 abutting on P street does not appear. Although the notice was ambiguous, it conveyed to the city authorities, with reasonable definiteness, a description of the place where the accident happened, and was, therefore, sufficient. It was said in City of Lincoln *v.* O'Brien, *supra*, that the statute is a harsh one, and should be liberally construed by the courts. The rule of construction to be deduced from the adjudged cases is that, if the description given and the inquiries suggested by it will enable the agents and servants of the city to find the place where the accident occurred, there is a substantial compliance with the law. City of Lincoln *v.* O'Brien, *supra*; City of La Crosse *v.* Town of Melrose, 22 Wis. 459; Harder *v.* City of Minneapolis, 40 Minn. 446, 42 N. W. 350. The Carr Block, according to the evidence, is a well-known building on P street in the city of Lincoln, and the coal hole described in the notice was near the west side of it. This being so, we cannot believe that any person possessed of ordinary powers of perception could have failed to locate the place of the accident, if he had made an honest effort so to do. It would be a singularly heavy-witted and purblind official who, with the plaintiff's notice in his hand, could not go out, and readily find the *locus in quo*. In the absence that there was a block numbered 45 on P street, there is nothing to indicate that the notice had even a slight tendency to mislead. The erroneous part of the description was mere harmless surplusage. There is no reversible error in the record, and the judgment is therefore affirmed.

Same.

CITY OF TOPEKA

v.

RAYNOR.

(*Supreme Court of Kansas, Oct. 7, 1899.*)

Title of Ordinance—Constitutional Questions.—No constitutional question is involved in a contention that a municipal ordinance is void, in that it contains more than one subject, as such matter is regulated by statute.

Intoxicating Liquors—Ordinances—Constitutional Law.—One convicted of a violation of an ordinance providing for the abatement of common nuisances, is not entitled to a reversal, upon the ground that the ordinance violates section 15 of the bill of rights of the constitution, in providing for a search and seizure of the premises upon which intoxicating liquor is sold, where the record fails to show that defendant's premises were searched, or his property seized, and the return on the warrant merely shows that the officer executed the same by arresting defendant, and bringing his body before the court.

Same—Same—Nuisances—Bill of Rights.*—Cities have power to pass ordinances providing that "all places where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage are common nuisances," the contention that such ordinances violate section 1 of the bill of rights, declaring that "all men are possessed of equal an inalienable natural rights, among which are life, liberty and the pursuit of happiness," being without merit.

ERROR by defendant from Northern department, Eastern division court of appeals. *Dismissed.*

J. S. Ensminger, for appellant.

W. A. S. Bird, for appellee.

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*As to power of municipal corporation to declare property a nuisance, see generally *notes*, 1 Mun. Corp. Cas. 418 *et seq.*

As to power of municipality to declare house where intoxicating liquor is sold a nuisance, see Mernaugh *v.* City of Orlando, *ante* 164, and *notes* 171.

City of Topeka *v.* Raynor

PER CURIAM. Appellant invokes the jurisdiction of this court as a matter of right. He was convicted in the police court of the city of Topeka for the violation of an ordinance entitled "An ordinance defining and relating to common nuisances, and providing for the abatement of the same." On appeal to the district court he was again convicted of the same charge, and the judgment of the district court was affirmed by the court of appeals.

Appellant can have no standing here unless the case involves the constitution of this state or of the United States. He first contends that the ordinance which he was adjudged to have violated is void, in that it contains more than one subject, in violation of section 109 of the charter of cities of the first class. There is no constitutional provision relating to the title of ordinances. The matter is regulated by statute. No constitutional question is, therefore, involved in this contention of the appellant. City of Humbolt *v.* McCoy, 23 Kan. 249.

Title of Ordinance—Constitutional Questions.

It is next asserted that that part of the ordinance providing for a search and seizure of the premises upon which intoxicating liquor is sold violates section 15 of the bill of rights of the constitution. The record fails to show that in this proceeding the appellant's premises were searched, or his property seized. The officer's return on the warrant simply shows that he executed the same by arresting Frank Raynor, and bringing his body before the court.

Intoxicating Liquors—Ordinances—Constitutional Law.

There is no force in the contention that under the ordinance a warrant may issue upon a complaint not sworn to. While the ordinance provides that a warrant may issue "upon the filing of a complaint," section 139, c. 32, Gen. St. 1897, provides that the police judge shall only issue a warrant when complaint is made on oath or affirmation. Here the complaint was duly verified before it was filed.

Section 1 of the ordinance provides: "All places where

Same—Same—Nuisances—Bill of Rights.

persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage are common nuisances." This, the appellant contends, violates section 1 of the bill of rights, which declares: "All men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness." This argument is without force, and wholly wanting in authority. Cities have the power to pass such ordinances. Gen. St. 1897, c. 32, § 88; Franklin *v.* Westfall, 27 Kan. 614; City of Topeka *v.* Myers, 34 Kan. 500, 8 Pac. 726; Same *v.* Zufall, 40 Kan. 47, 19 Pac. 359; Junction City *v.* Keeffe, 40 Kan. 275, 19 Pac. 735; Same *v.* Webb, 44 Kan. 71, 23 Pac. 1073; Monroe *v.* City of Lawrence, 44 Kan. 607, 24 Pac. 1113. The ordinance is a transcript of the state law, and has been upheld as constitutional many times.

The other questions relate to questions of practice and error in the instructions given by the court to the jury. We cannot consider these, there being no constitutional question involved in the case. The appeal and petition in error will be dismissed.

CITY OF GUTHRIE

v.

T. W. HARVEY LUMBER CO.

(*Supreme Court of Oklahoma, Feb. 8, 1900.*)

Liability of Municipality for Debts of Provisional Government.*—The provisional governments for the regulation and management of the affairs of the cities and towns of the territory of Oklahoma which were established prior to the act of congress approved May 2, 1890, were but voluntary associations of the people living in them, were without legal authority, and had no power to contract debts which should constitute legal obligations upon the municipalities

*See Guthrie Nat. Bank *v.* City of Guthrie (U. S.), 1 Mun. Corp. Cas. 734.

City of Guthrie *v.* T. W. Harvey Lumber Co

afterwards formed under authority of law. City of Oklahoma City *v.* T. M. Richardson Lumber Co., 39 Pac. 386, 3 Okl. 5, affirmed.

Appeal—Review.—There was evidence in the case strongly tending to show that the building for which payment is sought here was the property of the defendant in error, who had undertaken to sell it to the provisional government of East Guthrie, and that fact was included in the verdict of the jury, which will not, under these circumstances, be reviewed here.

Effect of Subsequent Statute.—The act of the legislature contained in chapter 13 of the Statutes of 1893, providing for the enforcement of claims against the provisional government of the city of Guthrie, had no effect to impair the validity of claims which should first be asserted in the district court.

Action—Demand—Limitations.—Where a demand is necessary to perfect the right of action, the statute runs only from the time of the demand. This was a case of tortious action, and the claim is not barred by any provision of our statute.

(Syllabus by the Court.)

ERROR by defendant from Logan county district court. *Affirmed.*

This was an action begun by the Harvey Lumber Company to recover the value of a building which it alleged that the defendant, the city of Guthrie, had converted to its own use in 1890, and for which payment had been refused. The amended petition, upon which the case was tried, averred that the plaintiff had contracted in 1889 with the provisional government of East Guthrie for the erection of a building upon lots 23 and 24, block 46, East Guthrie; that that city had agreed to pay therefor the sum of $594.90, and had issued to the plaintiff in payment several warrants aggregating that sum; that the plaintiff had complied with its contract, and that the city of Guthrie had taken possession of, appropriated, and refused to pay for it; and that on April 30, 1896, a formal demand was made for payment, which was refused, and thereupon this suit was brought, and a judgment sought for its value. The defendant answered by a general denial, by pleading in bar the statute of limitations, and further subsequently alleged by an

amendment that the building had been purchased from one C. C. Howell, and that full payment had been made therefor. The plaintiff replied, denying generally. Upon these issues the cause was tried, verdict rendered, and judgment entered for the plaintiff for the value of the building.

W. B. Herod and *D. R. Widmer*, for plaintiff in error.
Dale & Bierer, for defendant in error.

McATEE, J. (after stating the facts). The assignments of error are argued upon the action of the court in overruling the motion of plaintiff for a new trial. It is stated as a fact, in the brief of the plaintiff in error, that the evidence offered at the trial did not tend to support the averment that the Harvey Lumber Company had contracted to sell or erect any building whatever for the provisional government of East Guthrie. The evidence shows that in the spring of 1889 the Harvey Lumber Company, which was located in Ohio, had two agents in Oklahoma, one of whom was Alexander, a builder; that in May of that year Alexander reported to the plaintiff that a sale had been made for such a building in Guthrie, and that the building was manufactured by the lumber company, and shipped to Oklahoma; that it was received and located in East Guthrie, accepted by the authorities of the provisional government there, and appropriated to its use. There is evidence on the part of the defense that one C. C. Howell was engaged in some way in negotiating with the provisional government of East Guthrie concerning the sale of the building, but there is no evidence in the record that Howell had any ownership in it, or that the ownership was ever in any manner transferred, except as herein stated. And the records of the proceedings of the city of East Guthrie, as introduced in evidence, show that on June 10, 1889, an allowance was made to the Harvey Lumber Company "for city building," due in 30 days $216, 60 days $217, and 90 days $217, and that an allowance was at the same time made to C. C. Howell, for

Liability of Municipality for Debts of Provisional Government.

"labor and material," $267.19. It has been heretofore held in the case of City of Oklahoma City *v.* T. M. Richardson Lumber Co., 3 Okl. 5, 39 Pac. 386, that the provisional governments for the regulation and management of the affairs of the cities and towns of the territory of Oklahoma which were established prior to the act of congress approved May 2, 1890, of which the city of East Guthrie was one, were but voluntary associations of the people living in them, were without legal authority, and had no power to contract debts which should constitute legal obligations upon the municipalities afterwards formed under authority of law. Inasmuch, therefore, as the provisional government of East Guthrie was incapable of contracting, the attempted sale by the Harvey Lumber Company was ineffective, and no interest was transferred when the building was shipped and placed upon the lots in the city of East Guthrie which were appropriated by the people there to the uses of that provisional government. The property in the building remained in the Harvey Lumber Company, so far as the city of East Guthrie was concerned. There is no evidence in the record that any transfer of the property was ever made to Howell. The question of such a transfer to Howell was submitted to the jury, under proper instructions from the court, and repudiated by it. There was evidence in the case tending to show that the building was the property of the Harvey Lumber Company, which had contracted to sell it to the provisional government of East Guthrie; and that fact was included in the verdict of the jury, which will not, under these circumstances, be reviewed here. Bank *v.* Earl, 2 Okl. 617, 39 Pac. 391.

Appeal—Review.

It is argued, in the second place, that no demand upon the city of Guthrie was proven, that no proper basis of the value of the building or measure of damages was shown, and that the defendant was not guilty of conversion at all, and that all these facts would appear upon a careful reading of the record. Upon this challenge we have read the record from beginning

Effect of Subsequent Statute.

to end. It shows from the testimony of De Groff, clerk of the city of Guthrie at the time, that "a bill of the T. W. Harvey Lumber Company against the city of Guthrie was presented on the 30th day of April, 1896, and it was not allowed." It shows from the testimony of several witnesses,—contractors, builders, and persons acquainted with the property and its history, and its value and condition,—the value of the building at the time of the alleged conversion, as nearly as could reasonably be expected at this distance of time, and the evidence that adequate and proper testimony upon the question of value and measure of damages was submitted to the jury. An ordinance signed by the mayor and city clerk of the provisional government of East Guthrie, as it appears in the ordinance book of that city, undertook to turn over the building, for which payment is here sought, to the city of Guthrie, and made an elaborate provision for its sale and the appropriation of the proceeds. A record of the council proceedings of the city of Guthrie was introduced in evidence, by which it appeared that bids were advertised for and received for moving the building from the city of East Guthrie to the premises of the plaintiff in error; that the building was fully identified as the building belonging to the Harvey Lumber Company; that it is now occupied by the city offices of the plaintiff in error, and as a police station and fire house. It is also argued that, inasmuch as the legislature of 1890 enacted a statute embodied in chapter 13, p. 156, of the Statutes of 1893, entitled "An act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, now consolidated into the village of Guthrie," which provides for the appointment of commissioners by the judge of the district court as referees to inquire into and pass upon the demands granted by the city government; and that, inasmuch as the plaintiff did not present and file his claim with the commission which was appointed under this act, the claim here sued on is barred by that act; and the decision

by the supreme court of the United States in Guthrie Nat. Bank *v.* City of Guthrie, 19 Sup. Ct. 513, 43 L. Ed. 796, is referred to as authority for this position. But this case, as decided in the supreme court of the United States, does not support the conclusion thus sought for here. The import of the decision cited is to affirm the validity of that act of the legislature, and of the proceedings thereunder, for the enforcement of the claims therein sought to be provided for, while the conclusion sought for here is that, inasmuch as the plaintiff, the Harvey Lumber Company, did not avail itself of the remedy provided for under that act, it is now debarred and precluded from asserting its rights in the district court, —a conclusion with which we cannot agree. There was nothing in the act contained in chapter 13 of the Statutes of 1893 which undertook to impair the validity of claims which should be first asserted in the district court.

The statute of limitations was pleaded in bar of the action on behalf of the city of Guthrie. It cannot be sustained. The liability of the city of Guthrie arises in consequence of its appropriation of the property of the lumber company without the consent of the plaintiff, and a demand for payment on behalf of the plaintiff was a necessary precedent to this action. The rule is that, where the demand is necessary to perfect the right of action, the statute runs only from the time of the demand. The demand for payment was made on April 30, 1896. The action was begun on the 15th day of July, 1896, and is, therefore, not barred by any provision of the statute. 13 Am. & Eng. Enc. Law, 721; High *v.* Board, 92 Ind. 580; Leather Manufactures' Bank *v.* Merchants' Bank, 128 U. S. 26, 9 Sup. Ct. 3, 32 L. Ed. 342; Lamb *v.* Clark, 5 Pick. 193.

Action—Demand —Limitations.

Error is assigned upon the instructions of the court. We have examined them carefully. They state the law correctly as applicable to the facts in this case. A very strong preponderance of the evidence shows that the building was attempted to be purchased by the provisional government of the city of East Guthrie from the Harvey Lumber Company;

was shipped from Ohio, and received in Guthrie, and appropriated by that provisional government to its use; was thereafter appropriated by the city of Guthrie by an agreement between its government and the authorities of East Guthrie; and that the building is unpaid for. The judgment of the court below will therefore be affirmed. All the justices concur, except BURFORD, C. J., who presided in the cause below.

TILLMAN
v.
BEARD.

(*Supreme Court of Michigan, Oct. 3, 1899.*)

Violation of Ordinance—Ordering Arrest without Warrant—Liability of Village President.—The machine of a vender of peanuts, which was operated by steam generated by a gasoline burner, was located in front of a store by permission of the merchant, when the president of the village ran it out in the street, and ordered the arrest of its proprietor without a warrant, merely for exercising his vocation without the license required by ordinance, which order was carried out by the village marshal. *Held*, that the president by ordering the arrest rendered himself liable in damages for all its consequences, although he was a conservator of the peace.

Violation of Void Ordinance—Procuring Arrest—Liability.—A party in good faith procuring an arrest for violation of an ordinance does not thereby render himself liable in damages, although a *nolle prosequi* is entered upon the ground that the ordinance was void.

ERROR by plaintiff to Shiawassee county circuit court. *Reversed.*

Plaintiff was a vender of popcorn and peanuts. He had a machine 5 feet 2 inches long, 2½ feet wide, and about 5½ feet high. The machinery was operated by steam generated by a gasoline burner. Plaintiff had obtained permission from a merchant in the village of Morrice to put his stand in the street in front of his store. There was an ordinance pro-

hibiting the exercise of his vocation without taking out a license. He had taken out no license. The defendant was president of the village. He found plaintiff located as above stated, without a license. He took hold of his machine, ran it out into the street, and ordered the village marshal to arrest plaintiff. The marshal arrested him, and took him to jail, where he was confined about three hours. He was then released, rearrested upon complaint and warrant, convicted, fined, and appealed to the circuit court, where a *nolle prosequi* was entered, upon the ground that the ordinance was void. When the plaintiff had rested, the court directed a verdict for the defendant.

John T. McCurdy, for appellant.
Watson & Chapman, for appellee.

GRANT, C. J. (after stating the facts). The declaration contains four counts, and alleges assault and battery, false imprisonment, and malicious prosecution.

1. The first arrest, without a complaint and warrant, was illegal. Officers are justified in arresting without a warrant only in cases of felony and breaches of the peace. This is elementary. It is needless to cite authorities. Plaintiff was engaged in no act dangerous to the public, or liable to cause disturbance upon the streets. The act was not *malum per se*, but only *malum prohibitum*. There was no danger of escape. There was no obstruction in the public highway requiring immediate removal for the convenience of the public. The respondent may have acted in good faith in ordering the arrest of plaintiff, but he certainly acted hastily, and without any legal authority. The statute did not give him, as conservator of the peace, the authority to imprison citizens of the village in this summary manner. By ordering the arrest, he made himself responsible for it, and liable for all its consequences. Webb, Pol. Torts, 264, and authorities there cited; Veneman *v.* Jones, 118 Ind. 41, 20 N. E. 644; Gilbert *v.* Emmons, 42 Ill. 143.

Violation of Ordinance—Ordering Arrest without Warrant—Liability of Village President.

2. The village was organized under Act No. 3, Pub. Acts 1895. By section 2, c. 4, of said act, the president of a municipality is made a conservator of the peace. He is the chief executive of the village, and, as such, it becomes his duty to see that the ordinances of the village are enforced. We held in Brooks *v.* Mangan, 86 Mich. 576, 49 N. W. 633, that neither a justice of the peace issuing, nor the officer serving, a warrant under a void ordinance was liable. The reasons for such rule are there fully stated. For the same reason, an officer who, in good faith, makes a complaint in the belief that the ordinance is valid, is not liable. A party in good faith making a complaint for the violation of any law or ordinance is not required to take the risk of being mulcted in damages if courts afterwards hold it unconstitutional. This rule is dictated by the plain principles of public policy. In Marks *v.* Townsend, 97 N. Y. 590, it is said: "This rule of exemption is founded in public policy, and is applicable alike to civil and criminal remedies and proceedings, that parties may be induced freely to resort to the courts and judicial officers for the enforcement of their rights and the remedy of their grievances, without the risk of undue punishment, or their own ignorance of the law or for errors of courts and judicial officers." If the officer is protected in the service of the warrant, in which act he is performing a duty imposed upon him by law, why should he not be equally exempt where he is in the performance of his duty in makiug complaint for the violation of an ordinance of his municipality? I think the reason of the above case covers this. I have not found a case where a police officer, or an officer charged with the duty of enforcing the law, has made a complaint. I find, however, many cases involving the liability of persons making criminal complaints, and thus causing arrests. In Ross *v.* Griffin, 53 Mich. 5, 18 N. W. 534, plaintiff was arrested on a writ of commitment for contempt. The writ was issued by the judge of the superior court of the city of Detroit upon the motion of the solicitors

Violation of Void Ordinance—Procuring Arrest—Liability.

for the complainant in the suit against Ross. He was discharged by this court upon a writ of *habeas corpus*, the court holding that the commitment was erroneous. This court held that neither the judge nor the solicitors who procured the commitment were liable in an action for false imprisonment, the record showing that they acted in good faith. Where a party had been arrested under a statute afterwards held to be unconstitutional, and thereby the magistrate had no jurisdiction, and the process was void, the court say: "The authorities are conclusive that, when a person does no more than to prefer a complaint to a magistrate, he is not liable in trespass for acts done under the warrant which the magistrate thereupon issues, even though the magistrate has no jurisdiction. If the complaint is malicious, and without probable cause, the complainant may be answerable under another form of action." Barker *v.* Stetson, 7 Gray, 53, and authorities there cited. This case is cited with approval in Langford *v.* Railroad Co., 144 Mass. 431, 11 N. E. 697. Where the judge has determined, in the exercise of the jurisdiction committed to him by the law, that the affidavit was sufficient to entitle the party to the writ, it is said: "To hold that such party is liable in damages for the erroneous judgment of the judge would impose on him a responsibility not warranted by law." Dusy *v.* Helm, 59 Cal. 188. In Loomis *v.* Render, 48 Hun, 268, defendant was held liable for false imprisonment, where he drew the complaint, had it signed by another, took it to the justice, filled up the warrant, gave it, signed by the justice, to the constable, and ordered the arrest of plaintiff at any cost. It is there said: "The defendant would not have been liable if he had only presented the complaint to the justice, and asked for a warrant, if he had done so in good faith and without malice." In Carratt *v.* Morley, 1 Q. B. 18, it was held "that a party who merely originates a suit by stating his case to a court of justice is not guilty of trespass, though the proceedings should be erroneous or without jurisdiction." That case was brought against Morley, who instituted the suit, and the officers who

issued the process for arrest. See Add. Torts, marg. p. 148. In Murphy *v.* Walters, 34 Mich. 180, it was said: "A person who simply lays facts before a magistrate, and leaves all further action to the unbiased and unsolicited conduct of the latter, is not liable in trespass for false imprisonment, unless he takes some part in furthering the arrest or urging detention." Where a party was arrested under a void act of the legislature, the court say: "It seems to us that the mere fact that the defendant made the affidavit, under the circumstances, is not enough to warrant the court in ruling, as a matter of law, that he was liable for the imprisonment." Fenelon *v.* Butts, 49 Wis. 342, 5 N. W. 784, cited with approval in Gelzenleuchter *v.* Niemeyer, 64 Wis. 321, 25 N. W. 443. It is stated in the Amercian and English Encyclopedia of Law ([2d Ed.] p. 756, note 5): "The true rule is believed to be this: Though the warrant on which the arrest was made is invalid for insufficiency of the affidavit, the affiant is not, however, liable in false imprisonment, unless he participated in the issuance or execution of the warrant beyond the mere making of the affidavit." A case precisely in point is Gifford *v.* Wiggins, 50 Minn. 401, 52 N. W. 904. Plaintiff was arrested under a void ordinance, upon the complaint of the defendant, who, so far as the record shows, was a private citizen. The ordinance was afterwards held to be absolutely void, but the defendant was held not liable for false imprisonment. It is there said: "It seems to be settled by an almost unbroken line of authorities that if a person merely lays a criminal complaint before a magistrate in a matter over which the magistrate has a general jurisdiction, and the magistrate issues a warrant, upon which the person charged is arrested, the party laying the complaint is not liable for an assault and false imprisonment, although the particular case may be one in which the magistrate had no jurisdiction." Judgment reversed, and a new trial ordered. The other justices concurred.

HORNUNG

v.

MCCARTHY *et al.*

(*Supreme Court of California, Sept. 8, 1899.*)

Local Assessments—Defenses—Failure to Provide for Compensation.*—In an action by a contractor, or his assignee, to enforce a local assessment by a municipal corporation against abutting property, the right of action grows out of the governmental power of taxation; and it is no defense that the property owner may have a cause of action against the municipality, by reason of injury to the property, founded upon rights reserved by that part of the constitution of California dealing with the exercising of the right of eminent domain.

Same — Final Judgments — Reassessments.—A judgment of the superior court, final in its nature, declaring a local assessment void for informality, etc., is a final judgment within the meaning of the statute of California, providing that any person interested may, after a final judgment declaring a local assessment void for informality, etc., apply for another assessment, although at the time of the application the period in which an appeal may be taken from the judgment has not expired.

Officers.—The successor of the city engineer in office at the completion of an improvement may make a valid certificate from the official data he finds in the office.

APPEAL by plaintiff from city and county of San Francisco superior court. *Reversed.*

J. C. Bates, for appellant.

Otto Tum Suden, for respondents.

MCFARLAND, J. Action by plaintiff, as assignee of Madigan, contractor, to enforce a street assessment against a lot owned by defendant on M street south, between Eighth and Ninth avenues south. Judgment went for defendant, and

*See notes at end of case.

plaintiff appeals from the judgment upon the judgment roll, which includes findings.

The main ground upon which the court below gave judgment for respondent, and the one principally discussed in the briefs, is this: That the whole assessment proceeding was void because founded upon a contract which was void for the reason that it contemplated the damaging of appellant's land for public use "without just compensation having been first made to, or paid into court for, the owner," within the meaning of section 14 of article 1 of the state constitution. We do not think that this position is tenable. The findings of the court on this point are substantially these: That the board of supervisors, by resolution of intention, ordered M street, between the two avenues, to be "graded to the official line and grade," and let the contract to do the grading to the contractor, Madigan; that at the time of the contract M street was "in a state of nature, in that it had never been graded to any grade"; that respondent's lot was flush with the street, as it was originally, so that there was easy ingress and egress between the lot and street; that the necessary result of carrying out the intention of the board, and the doing of the work provided by the contract, would be to excavate the street to a depth of 30 feet below the natural level of respondent's lot, and thus greatly damage it by cutting off the ingress, etc.; that the board made no provision for compensating respondent for the damage which would result; that, "notwithstanding the board of supervisors knew" that the proposed work would damage the lot, still they "caused and ordered said contract to be entered into with the said Madigan, and caused said Madigan to perform the work"; and that Madigan did perform the work and enter into the contract, and did excavate the street to a depth of 30 feet, as aforesaid, whereby the lot was damaged in the sum of $1,500. It appears this was not a case where an official grade had been changed after a lot owner's title to his property had attached; but, as the case will be determined on other principles, we will not discuss

the question whether or not one who acquires a lot after the official grade has been established can recover incidental damages resulting from work necessary to put the street on the official grade.

It is to be noticed that this is not an action to recover damages, as was Eachus *v.* Railway Co., 103 Cal. 614, 37 Pac. 750, and other cases cited by respondent; nor is it an action to enjoin the prosecution of work, as was Geurkink *v.* City of Petaluma, 112 Cal. 306, 44 Pac. 570; nor is it like Bigelow *v.* Ballerino, 111 Cal. 559, 44 Pac. 307, in which it was merely decided that where the municipal authorities made an order closing a street, which order was invalid because made without compensation for the taking of appellant's property, the latter could maintain his easement in the street until compensation had been made. Respondent has not cited and relied on any case where the action was to enforce an assessment, and a defense similar to the one here interposed was set up. Whether or not the respondent could maintain an action for damages against the city, or whether he might have enjoined the prosecution of the work, are not questions here presented. The rights involved here are those of the contractor, and, in order to support the judgment, it must be maintained that, as to him, the contract, at the time it was made, was void. How can this proposition be maintained? The ground on which it rests is simply this: It is found that at the date of the contract the board of supervisors knew that its fulfillment would damage the lot, and knew that no compensation had been made; and, although it was not expressly found, we presume that it was inferred, that the contractor must have known, from the nature of the contract, that the damage would ensue. It is not found, however, that the contractor knew that no compensation had been made, and there is nothing to show that his attention was called to the matter in any way. The respondent never demanded compensation of anybody; he never made any objection to the doing of the work by the contractor, nor took any step to

Local Assessments—Defenses—Failure to Provide for Compensation.

stop it; and, if the contractor had thought of the subject, he might well have presumed that respondent had waived damages, or had made some arrangement with the board on the subject. But respondent, after having allowed the contractor to incur the expense of doing the work without objection of any kind, now attempts, not to recover damages, but to have the entire assessment declared void, and the contractor not entitled to anything for his work, because a third party—the board of supervisors—had not paid him some money which he had never demanded, and about which the contractor knew nothing. The appellant's rights here grow out of the governmental power of taxation (Emery *v.* Gas Co., 28 Cal. 346), and the consideration that the respondent may have some cause of action founded upon rights reserved by that part of the constitution which deals with the exercise of the power of eminent domain does not make the assessment proceeding void. His claim for damages can certainly not be used as a set-off or counterclaim to the cause of action sued on. The only cases like the one at bar to which we have been referred are cases decided by the supreme court of Missouri, in which the law is declared to be as above stated. Keith *v.* Bingham, 100 Mo. 300, 13 S. W. 683, cannot be distinguished from the case at bar. That was an action upon tax bills for grading and other work done on a street; and the answer contains, among other things, the following: "Defendant, for a third defense to the tax bills sued on, states that the lot described by plaintiff's petition is now, and was at all the times stated in the plaintiff's petition, private property; that the grading mentioned in plaintiff's petition was done for public use, and damaged, and did not benefit, said lot; that no compensation was made or tendered to or paid into court for any person as the owner of said lot on account of said damages,—wherefore the defendant asks judgment." In response to this defense, the court says: "It is claimed by defendant that the tax bills in suit were issued in violation of that section of the constitution which declares 'that private property shall not be taken

or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed.' Const. 1875, art. 2, § 21. Looking at this defense from the most favorable standpoint, it is evident that it is untenable. The section of the constitution just quoted refers to, and is intended to regulate, the exercise of the right of eminent domain; whereas special assessments for local improvements, such as the tax bills before us, are referable to, and sustainable under, the taxing power. This distinction is well recognized both here and elsewhere in the United States. Garrett *v.* City of St. Louis, 25 Mo. 505; Lewis, Em. Dom. § 5. If the taxing power has been called into play in the mode required by law for the purpose of paying for a local improvement, such as paving or grading a street, it is no defense to a bill issued therefor to say, as is said here, that the street or the improvement damaged and did not benefit, the property, though, if such were the fact, the party might have his action, on a proper showing, under the constitution, for such injury. Householder *v.* City of Kansas, 83 Mo. 488. If the city had invoked the power of eminent domain unlawfully in the premises, it could be held actionable therefor; but that would not interfere with the collection of the special tax bill for an improvement regularly made under the taxing power. The right of action which a person would thus have against the municipality would constitute no just defense to the claims of the contractor who had made the improvement, and to whom, under the law in question, the tax assessment is payable." Our conclusion is that the assessment was not void upon the grounds above noted.

Same—Final Judgments—Reassessments.

Respondent also makes some contention that the assessment was void upon two other grounds, which are in their nature technical:

First. The present action is upon a second assessment, made under section 9 of the street law (St. 1891, p. 205),

which provides that, where it appears by final judgment that a suit brought to foreclose an assessment lien has been defeated by reason of any defect, error, or informality, etc., any person interested may, at any time within three months after the filing of the judgment, apply to the superintendent of streets for another assessment; and it is contended by respondent that there was no final judgment in the former suit brought by the appellant, because the time within which an appeal might be taken from that judgment to this court had not expired when the demand for the new assessment was made. It is no doubt true that for certain purposes an action brought in the superior court is to be deemed as "still pending," although a final judgment has been rendered in said court, until the time for appealing to this court has expired; and that rule has been declared in the decided cases principally where a judgment of a superior court has been invoked as a bar to another action. But a judgment of the superior court, final in its nature, declaring an assessment void for informality, etc., is clearly within the meaning of the street law, where the words used are, "Any final judgment of any court of this state" (Cook *v.* Rice, 91 Cal. 664, 27 Pac. 1081); and this is certainly so where the plaintiff in such a suit, instead of appealing, has substantially abandoned his appeal by the act of applying for a new assessment. And the judgment was not less final because certain fictitious defendants—John Doe, Robert Roe, etc.—were not served, and did not appear, and there was no judgment against them. The court found that the respondent McCarthy appeared and contested the action, and that he is, and was at all the times mentioned in the complaint, "the sole owner of said lot of land."

Second. It is contended that there was no valid certificate of the city engineer, because one Fitzhugh was city engineer up to the time the work was completed, and went out of office without making any certificate. But a proper certificate was made by Tilton, who succeeded Fitzhugh as city engineer; and the person in office is the proper officer to make such a certificate, and for that

Officers.

purpose may, of course, use the official data found in the office. The judgment appealed from is reversed.

We concur: HENSHAW, J.; TEMPLE, J.

NOTES.

LOCAL ASSESSMENTS.

Definition.
Exercise of Taxing Power.
Peculiar Species of Taxation.
Distinguished from Taxation.
Benefit Basis of Assessment.
  Must Be Present and Immediate.
  Must Accrue to Premises Assessed.
  Must Accrue to Land, Not to Owner as Individual.
Delegation of Power to Levy to Municipality.
  Power Must Be Clearly Given.
  Not Implied from General Grants.
  Statute Must Be Strictly Construed and Followed.
  View that Power Is Peculiarly A Municipal One.
  Municipality Cannot Delegate Power Where Judicial Discretion Is Required.
  Municipality May Delegate Ministerial Duties.
Constitutionality.
  Generally.
  Due Process of Law.
    Assessment Exceeding Benefit.
  Uniformity and Equality of Taxation.
  Taking Property without Compensation.
Improvements for Which Levied.
  (1) Streets.
    (a) Opening.
    (b) General Street Improvements.
    (c) Repaving and Repairing.
      Rule in Pennsylvania.
    (d) Street Crossings and Crosswalks.
    (e) Sweeping and Sprinkling.
    (f) Lighting.
  (2) Sidewalks.

Notes

(3) Sewers.
  (a) General Maintenance.
  (b) Assessments against Owners of Private Sewers.
  (c) Assessments in Particular Cases.
(4) Drains.
(5) Levees and Dikes.
(6) Parks and Public Squares.
(7) Water Pipes.
(8) Miscellaneous.

Definition.—" 'Assessments' are special and local impositions upon property in the immediate vicinity of an improvement for the public welfare, which are necessary to pay for the improvement, and laid with reference to the special benefit which such property derives from the expenditure." Palmer *v.* Stumph, 29 Ind. 329; Reinken *v.* Fuehring (Ind.), 37 Am. & Eng. Corp. Cas. 354, 130 Ind. 382, 30 N. E. 414.

The popular as well as the legal signification of this term has always indicated those special and local impositions upon property in the immediate vicinity of an improvement, which are necessary to pay for the improvement and laid with reference to the special benefit which such property derives from the expenditure of the money. Hill *v.* Higdon, 5 Ohio St. 243; Cincinnati, etc., R. Co. *v.* Sullivan, 32 Ohio St. 157; Chamberlain *v.* Cleveland, 34 Ohio St. 551; Lima *v.* Lima Cem. Ass'n, 42 Ohio St. 128, 5 Am. & Eng. Corp. Cas. 547.

In Walker *v.* Jameson, 140 Ind. 591, 49 Am. St. Rep. 442, local assessments were defined as charges "laid upon individual property, because the property upon which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys in common with others as a citizen." Citing Elliott, R. & S. 370.

And in McGuire *v.* Brockman, 58 Mo. App. 307, as charges for improvements for which the owner of the property improved should compensate the municipality.

Also as a species of taxation which can be made only for improvements which confer peculiar benefits upon adjoining property. *In re* Morewood Ave., 159 Pa. St. 20, 46 Am. & Eng. Corp. Cas. 341.

In Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63, an assessment of benefits was defined as "a *local* assessment imposed occasionally, as required, upon a limited class of persons interested in *local* improvement, who are assumed to be benefited by the improvement to the extent of the assessment; and it is imposed and collected as an *equivalent* for that *benefit*, and to pay for the improvement."

Notes

Exercise of Taxing Power.—The authority to levy a local assessment is referable to the taxing power.

United States.—Gilman *v.* Sheboygan, 2 Black (U. S.) 510.

Alabama.—Birmingham *v.* Klein, 89 Ala. 461, 32 Am. & Eng. Corp. Cas. 284.

California.—Emery *v.* San Francisco Gas Co., 28 Cal. 352; Burnett *v.* Sacramento, 12 Cal. 83; Taylor *v.* Palmer, 31 Cal. 240.

Colorado.—Palmer *v.* Way, 6 Colo. 106; Pueblo *v.* Robinson, 12 Colo. 593.

Connecticut.—Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63; Sargent *v.* Tuttle, 67 Conn. 162, 32 L. R. A. 822; Nichols *v.* Bridgeport, 23 Conn. 207, 60 Am. Dec. 636.

Georgia.—Hayden *v.* Atlanta, 70 Ga. 817, 7 Am. & Eng. Corp. Cas. 228.

Indiana.—O'Reiley *v.* Kankakee Val. Draining Co., 32 Ind. 190; Palmer *v.* Stumph, 29 Ind. 335.

Illinois.—Adams Co. *v.* Quincy, 130 Ill. 566.

Kentucky.—Bradley *v.* McAtee, 7 Bush (Ky.) 667.

Louisiana.—Municip. *v.* White, 9 La. Ann. 446; Munson *v.* Com'rs (La.), 8 So. Rep. 906.

Massachusetts.—Harvard College *v.* Boston, 104 Mass. 482; Weed *v.* Boston (Mass.), 42 L. R. A. 642.

Maryland.—Moale *v.* Baltimore, 5 Md. 314; Baltimore *v.* Greenmount Cemetery, 7 Md. 517; Baltimore *v.* Johns Hopkins Hospital, 56 Md. 1; Gould *v.* Baltimore, 59 Md. 378.

Michigan.—Williams *v.* Detroit, 2 Mich. 560.

Minnesota.—Williams *v.* Cammack, 27 Minn. 209, 61 Am. Dec. 208; Noonan *v.* Stillwater, 33 Minn. 198; Hennepin Co. *v.* Bartleson, 37 Minn. 343; McComb *v.* Bell, 2 Minn. 295.

Missouri.—Garrett *v.* St. Louis, 25 Mo. 505, 69 Am. Dec. 475; State *v.* St. Louis, 62 Mo. 244; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495, 72 Am. Dec. 276; Newby *v.* Platte Co., 25 Mo. 258; Keith *v.* Bingham 100 Mo. 300.

Nebraska.—Wilson *v.* Auburn, 27 Neb. 440.

New Jersey.—State *v.* Fuller, 34 N. J. L. 247; State *v.* Newark, 35 N. J. L. 168; Howell *v.* Essex Co., 32 N. J. Eq. 672.

New York.—Butts *v.* Rochester, 1 Hun (N. Y.) 600, 4 Thomp. & C. 92; Astor *v.* Mayor, etc., 5 Jones & S. N. Y. 562; Clarke *v.* Rochester, 5 Abb. Pr. (N. Y.) 125, 24 Barb. (N. Y.) 482, 14 How. Pr. 212; Moran *v.* Troy, 9 Hun (N. Y.) 542; Matter of Broadway, 63 Barb. (N. Y.) 579; Litchfield *v.* McComber, 42 Barb. (N. Y.) 291; Litchfield *v.* Vernon, 41 N. Y. 133; Brewster *v.* Syracuse, 19 N. Y. 118; New York P. E. School *v.* Davis, 31 N. Y. 582; *Re* Van Antwerp, 56 N. Y. 265; Roosevelt Hospital *v.* New York, 84 N. Y. 112; People *v.* Lawrence, 36 Barb. (N.

Notes

Y.) 194; Matter of Zborowski, 68 N. Y. 96; Guilford *v.* Cornell, 18 Barb. (N. Y.) 615; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Village of Fulton *v.* Tucker, 5 Thomp. & C. (N. Y.) 624.

Ohio.—Sessions *v.* Crunkilton, 20 Ohio St. 358; Scovill *v.* Cleveland, 1 Ohio St. 135; Hill *v.* Higdon, 5 Ohio St. 243, 67 Am. Dec. 289.

Pennsylvania.—Borough of Mt. Pleasant *v.* Baltimore, etc., R. Co., 138 Pa. St. 365, 32 Am. & Eng. Corp. Cas. 237; Hammett *v.* Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615; *In re* Washington Ave., 69 Pa. St. 352.

Rhode Island.—Bishop *v.* Tripp, 15 R. I. 466.

Texas.—Roundtree *v.* Galveston, 42 Tex. 612.

Vermont.—Allen *v.* Drew, 44 Vt. 175.

Wisconsin.—Dalrymple *v.* Milwaukee, 53 Wis. 178; Holton *v.* Milwaukee, 31 Wis. 27; Weeks *v.* Milwaukee, 10 Wis. 256; Soens *v.* Racine, 10 Wis. 271.

Peculiar Species of Taxation.—But it is a peculiar species of taxation.

Alabama.—Birmingham *v.* Klein, 89 Ala. 461, 32 Am. & Eng. Corp. Cas. 284.

California.—Burnett *v.* Sacramento, 12 Cal. 83.

Connecticut.—City of Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 255, 4 Am. Rep. 63; Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636; Sargent *v.* Tuttle, 67 Conn. 162, 32 L. R. A. 822.

Georgia.—Hayden *v.* Atlanta, 70 Ga. 817, 7 Am. & Eng. Corp. Cas. 228.

Louisiana.—Munson *v.* Atchafalaya Basin Levee Dist., 43 La. Ann. 45; City of Shreveport *v.* Prescott (La.), 2 Mun. Corp. Cas. 370.

Ohio.—Northern Ind. R. Co. *v.* Connelly, 10 Ohio St. 532; Baker *v.* Cincinnati, 11 Ohio St. 541.

Pennsylvania.—Borough of Mt. Pleasant *v.* Baltimore & O. R. Co. (Pa.), 32 Am. & Eng. Corp. Cas. 237; *In re* Morewood Ave., 159 Pa. St. 20, 46 Am. & Eng. Corp. Cas. 341.

Distinguished from Taxation.—The chief distinction between taxation in general and local assessments lies in the fact that the assessment is based on benefits, and not *ad valorem* (see *infra Based on Benefits*); also it is imposed only as occasion requires. Macon *v.* Patty, 57 Miss. 386, 34 Am. Rep. 451; Bridgeport *v.* New York, etc., R. Co., 36 Conn. 262.

The authorities almost universally have recognized this distinction and take such an imposition, though confessedly laid under the taxing power, out of the category of "taxes" and "taxation" as those terms are employed in organic limitations on legislative power to levy or authorize the levying of taxes, and in general statutes.

Notes

Cooley, Tax'n, 626; Burroughs, Tax'n, 460; 2 Dill. Mun. Corp. §§ 752, 753, 751.

England.—Bedford Union Poor Guard *v.* Bedford Impr. Commr's, 7 Exch. 777; Palmer *v.* Earith, 14 Mees. & W. 428, 14 L. J. Exch. N. S. 256; Perchard *v.* Heywood, 8 T. R. 468; Baker *v.* Greenhill, 3 Q. B. 148, 2 Gale & D. 435, 6 Jur. 710; Walker *v.* Andrews, 3 Mees. & W. 312; Brewster *v.* Kidgell, Carth. 438, 1 Ld. Raym. 317, 5 Mod. 369, 372, 12 Mod. 167, 1 Salk. 198, 2 Salk. 615, 3 Salk. 340, Comb. 424.

Alabama.—Birmingham *v.* Klein, 89 Ala. 461, 32 Am. & Eng. Corp. Cas. 284.

Arkansas.—Cribbs *v.* Benedict, 64 Ark. 555, 44 S. W. 707; McGeehee *v.* Mathis, 21 Ark. 40.

California.—People *v.* Austin, 47 Cal. 353; Chambers *v.* Satterlee, 40 Cal. 497; People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 676.

Connecticut.—Bridgeport *v.* New York & N. H. R. Co., 36 Conn. 255; Nichols *v.* Bridgeport, 23 Conn. 189.

Florida.—Egerton *v.* Green Cove Springs, 19 Fla. 140.

Georgia.—Hayden *v.* Atlanta, 70 Ga. 817.

Illinois.—Wright *v.* Chicago, 46 Ill. 44.

Indiana.—Goodrich *v.* Westchester & D. Turnpike Co., 26 Ind. 119; Palmer *v.* Strumpf, 29 Ind. 329.

Kansas.— Hines *v.* Leavnworth, 3 Kan. 186.

Kentucky.—Lexington *v.* McQuillan's Heirs, 9 Dana (Ky.), 513.

Louisiana.—Excelsior Planting & Manuf. Co. *v.* Tax Collector, 39 La. Ann. 467; Municipality No. Two *v.* Dunn, 10 La. Ann. 57; Barber Asphalt Paving Co. *v.* Gogreve (La.), 5 South Rep. 848; Yeatman *v.* Crandall, 11 La. Ann. 220; Crowley *v.* Copley, 2 La. Ann. 329.

Maryland.—Baltimore *v.* Green Mount Cemetery Co., 7 Md. 517.

Massachusetts.—Dorgan *v.* Boston, 12 Allen (Mass.) 223; Merrick *v.* Amherst, 12 Allen (Mass.) 500; Wright *v.* Boston, 9 Cush. (Mass.) 233; Boston Seam. Soc. *v.* Boston, 116 Mass. 185, 17 Am. Rep. 153.

Michigan.—Motz *v.* Detroit, 18 Mich. 495; Hoyt *v.* Saginaw, 19 Mich. 39, 2 Am. Rep. 76.

Mississippi.—Macon *v.* Patty, 57 Miss. 378; Williams *v.* Cammack, 27 Miss. 209.

Missouri.—Sheehan *v.* Good Samaritan Hospital, 50 Mo. 155; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495; Lockwood *v.* St. Louis, 24 Mo. 20; Uhrig *v.* St. Louis, 44 Mo. 458; Garrett *v.* St. Louis, 25 Mo. 505.

North Carolina.—Shuford *v.* Lincoln Co. Com'rs, 552; Wilmington *v.* Yopp, 71 N. C. 76; Cain *v.* Davis Co. Com'rs, 86 N. Car. 8.

New Jersey.—Tidewater Co. *v.* Coster, 18 N. J. Eq. 519.

New York.—People *v.* Brooklyn, 4 N. Y. 420.

Ohio.—Hill *v.* Higdon, 5 Ohio St. 243; Maloy *v.* Marietta, 11 Ohio St. 636.

Notes

Oregon.—King *v.* Portland, 2 Oreg. 146.

Pennsylvania.—Borough of Greensburg *v.* Young, 53 Pa. St. 280.

Texas.—Allen *v.* Galveston, 51 Tex. 302; Austin *v.* Gulf, Col. & Santa Fe R. R., 45 Tex. 234; Roundtree *v.* Galveston, 42 Tex. 613.

Virginia—Richmond & A. R. R. Co. *v.* Lynchburg, 81 Va. 473; Norfolk City *v.* Ellis, 26 Gratt. (Va.) 224; Norfolk *v.* Ellis, 26 Gratt. (Va.) 227.

Benefit Is Basis of Assessment.—"The theory upon which local assessments are sustained as a legitimate exercise of the taxing power is that the party assessed is locally and peculiarly benefited over and above the ordinary benefit which, as one of the community, he receives in all public improvements, to the extent of the assessment." State *v.* Newark, 3 Dutch. 190.

United States.—Bauman *v.* Ross, 167 U. S. 548, 17 Sup. Ct. 966.

California.—Emery *v.* San Francisco Gas Co., 28 Cal. 345; Burnett *v.* Sacramento, 12 Cal. 76.

Connecticut.—Nichols *v.* Bridgeport, 23 Conn. 189; Cone *v.* Hartford, 28 Conn. 363; Hungerford *v.* Hartford, 39 Conn. 279.

Illinois.—Chicago *v.* Larned, 34 Ill. 203; Ottawa *v.* Spencer, 40 Ill. 211; Chicago *v.* Baer, 41 Ill. 306; Creote *v.* Chicago, 56 Ill. 422; Hundley *v.* Lincoln Park Com'rs, 67 Ill. 559.

Indiana.—Lafayette *v.* Fowler, 34 Ind. 140.

Iowa.—Morrison *v.* Hershire, 32 Iowa 271.

Kentucky.—Lexington *v.* McQuillan, 9 Dana (Ky.) 513, 35 Am. Dec. 159; Bradley *v.* McAtee, 7 Bush (Ky.) 667; Howell *v.* Bristol, 8 Bush (Ky.) 493.

Massachusetts.—Jones *v.* Boston, 104 Mass. 461; Brewer *v.* Springfield, 97 Mass. 152; Wright *v.* Boston, 9 Cush. (Mass.) 233; Dorgan *v.* Boston, 12 Allen (Mass.) 223. See Sears *v.* Street Com'rs of Boston (Mass.), 2 Mun. Corp. Cas. 184, 53 N. E. 876.

Maryland.—Alexander *v.* Baltimore, 5 Gill (Md.) 383; Moale *v.* Baltimore, 5 Md. 314; Baltimore *v.* Greenmount Cemetery, 7 Md. 517; Howard *v.* First Independent Church, 18 Md. 451.

Maine.—Dyar *v.* Farmington, 70 Me. 515.

Michigan.—Thomas *v.* Gain, 35 Mich. 155; Hoyt *v.* East Saginaw, 19 Mich. 39, 2 Am. Rep. 76; Steckert *v.* East Saginaw, 22 Mich. 104; Brevoort *v.* Detroit, 24 Mich. 322; Motz *v.* Detroit, 18 Mich. 495.

Minnesota.—State *v.* Ramsey County Dist. Ct., 29 Minn. 62; Carpenter *v.* St. Paul, 23 Minn. 232.

Missouri.—Garrett *v.* St. Louis, 25 Mo. 505; St. Joseph *v.* O'Donoghue, 31 Mo. 345; Neenan *v.* Smith, 50 Mo. 525; St. Louis *v.* Clemens, 36 Mo. 467; St. Louis *v.* Armstrong, 38 Mo. 29; Uhrig *v.* St. Louis, 44 Mo. 458.

Nebraska.—Hanscom *v.* Omaha, 11 Neb. 37.

Notes

New Jersey.—State *v.* Newark, 27 N. J. L. 185; State *v.* Fuller, 34 N. J. L. 227; *In re* Drainage of Lands, 35 N. J. L. 497; State *v.* Newark, 37 N. J. L. 415; State *v.* Reed, 43 N. J. L. 186; State *v.* West Hoboken, 51 N. J. L. 267; Tide-water Co. *v.* Coster, 18 N. J. Eq. 519; State *v.* Hotaling, 44 N. J. L. 347; Passaic *v.* State, 37 N. J. L. 538; State *v.* Passaic, 38 N. J. L. 57; State *v.* Guttenberg, 38 N. J. L. 419.

New York.—Livingston *v.* New York, 8 Wend. (N. Y.) 86; Matter of Twenty-Sixth St., 12 Wend. (N. Y.) 203; Owners of Ground *v.* Albany, 15 Wend. (N. Y.) 374; Matter of Furman St., 17 Wend. (N. Y.) 649; Matter of DeGraw St., 18 Wend. (N. Y.) 568; People *v.* Brooklyn, 4 N. Y. 419.

Ohio.—Reed *v.* Toledo, 18 Ohio 161; Scoville *v.* Cleveland, 1 Ohio St. 126; Hill *v.* Higdon, 5 Ohio St. 243; Marion *v.* Epler, 5 Ohio St. 250; Reeves *v.* Wood County, 8 Ohio St. 333; Sessions *v.* Crunkilton, 20 Ohio St. 349; Kelley *v.* Cleveland, 34 Ohio St. 468; Chamberlain *v.* Cleveland, 34 Ohio St. 551.

Pennsylvania.—Craig *v.* Philadelphia, 89 Pa. 265; Com. *v.* Woods, 44 Pa. St. 113; Wolf *v.* Philadelphia, 105 Pa. St. 25; Kaiser *v.* Weise, 85 Pa. 366; McMasters *v.* Com., 3 Watts (Pa.) 292; Seely *v.* Pittsburgh, 82 Pa. 360, 22 Am. Rep. 760; Fenelon's Petition, 7 Pa. St. 173; Extension of Hancock St., 18 Pa. St. 26; Schenley *v.* Com., 36 Pa. St. 29; Wray *v.* Pittsburgh, 46 Pa. St. 365; Greensburg *v.* Young, 53 Pa. St. 280; Scranton *v.* Bush, 160 Pa. St. 499, 28 Atl. Rep. 926; Allentown *v.* Henry, 73 Pa. St. 404; Weber *v.* Reinhard, 73 Pa. St. 373.

Rhode Island.—*In re* Dorrance Street, 4 R. I. 230.

Virginia.—Violett *v.* Alexandria, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382.

Washington.—Turnwater *v.* Pix, 18 Wash. 153, 15 Pac. Rep. 353; Seattle *v.* Yesler, 1 Wash. Terr. 571.

Wisconsin.—Holton *v.* Milwaukee, 31 Wis. 27.

The value of each parcel of land, its location and its accessibility to the channel of the river should be considered in assessing it according to benefits for dredging improvements. Delaware, etc., Canal Co. *v.* Buffalo, 56 N. Y. Supp. 976.

Arbitrary assessment of an equal amount on property irrespective of benefits is illegal. State *v.* Brill (Minn.), 59 N. W. 989.

Uniform assessments, arbitrarily imposed by the lot on all property affected in the same way, will not be sustained if the benefits conferred vary. State *v.* Bayonne (N. J.), 1 Mun. Corp. Cas. 299, 42 Atl. Rep. 773. *Compare* Smith *v.* Cincinnati, 6 Ohio N. P. 175.

The frontage may be considered by the assessors in making an assessment according to benefits, if they act in good faith. Delaware, etc., Canal Co. *v.* Buffalo, 56 N. Y. Supp. 976.

Fact that an assessment is made according to benefits upon contig-

Notes

uous property does not render it a special tax. Bass *v.* South Park Com'rs, 171 Ill. 370, 49 N. E. 549.

Benefit Must Be Present and Immediate.—The benefit must be present and immediate, not remote and contingent.

Connecticut.—Hartford *v.* West Med. Dist., 45 Conn. 462; New York, etc., R. Co. *v.* New Haven, 42 Conn. 279; Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255.

Compare.—Park Ecc. Soc. *v.* Hartford, 47 Conn. 89; New York, etc., R. Co. *v.* New Britain, 49 Conn. 40.

Illinois.—Louisville, etc., R. Co. *v.* East St. Louis, 134 Ill. 556; Title Guarantee, etc., Co. *v.* Chicago, 162 Ill. 505.

Massachusetts.—Mt. Auburn Cemetery *v.* Cambridge (Mass.), 4 L. R. A. 836; Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray (Mass.) 156; Boston, etc., R. Co. *v.* Middlesex County, 1 Allen (Mass.) 331.

Nebraska.—Omaha *v.* Schaller, 26 Neb. 522.

New Jersey.—Vreeland *v.* Bayonne, 58 N. J. L. 126; DeWitt *v.* Elizabeth, 56 N. J. L. 119; Morris *v.* Bayonne, 53 N. J. L. 299; McKevitt *v.* Hoboken, 45 N. J. L. 482; King *v.* Reed, 43 N. J. L. 186; State *v.* Elizabeth, 40 N. J. L. 274; *In re* Pequest River, 39 N. J. L. 436; State *v.* Elizabeth, 37 N. J. L. 330; State *v.* Jersey City, 36 N. J. L. 58; State *v.* Newark, 27 N. J. L. 191.

New York.—*Re* Fourth Ave., 3 Wend. (N. Y.) 452.

Pennsylvania.—*Re* Washington Ave., 69 Pa. St. 353; Hammett *v.* Philadelphia, 65 Pa. St. 155.

Benefit Must Accrue to Premises Assessed.—The assessment can be made only on the premises actually benefited by the improvement.

California.—Taylor *v.* Palmer, 31 Cal. 254; Gaffney *v.* Gough, 36 Cal. 104.

Connecticut.—Nichols *v.* Bridgeport, 23 Conn. 189; City of Hartford *v.* West Mid. Dist., 45 Conn. 462; Cone *v.* Hartford, 28 Conn. 563.

Georgia.—Atlanta *v.* Gabbett, 93 Ga. 266.

Illinois.—Crawford *v.* People, 82 Ill. 557.

Kansas.—Gilmore *v.* Hentig, 33 Kan. 156, 5 Am. & Eng. Corp. Cas. 175; Atchison *v.* Price, 45 Kan. 296, 33 Am. & Eng. Corp. Cas. 130.

Louisiana.—*In re* Casavacco & Morean Sts., 20 La. Ann. 497; *In re* New Orleans Drainage Co., 11 La. Ann. 338.

Massachuetts.—Wright *v.* Boston, 9 Cush. (Mass.) 233.

Maine.—Dyar *v.* Farm. Village Corp., 70 Me. 527.

Michigan.—Thomas *v.* Gain, 35 Mich. 156.

Nebraska.—Hanscom *v.* Omaha, 11 Neb. 37; Smith *v.* Omaha, 49 Neb. 883, 69 N. W. 402.

New Jersey.—State *v.* Mayor, etc., of Jersey City, 45 N. J. L. 256,

Notes

4 Am. & Eng. Corp. Cas. 449; McKevitt *v.* City of Hoboken, 45 N. J. L. 482, 5 Am. & Eng. Corp. Cas. 522; State *v.* Newark, 8 Vroom (N. J.) 415; Paterson *v.* Society, 24 N. J. L. 385; State *v.* Mayor, etc., of Bayonne (N. J.), 1 Mun. Corp. Cas. 299; State *v.* Mayor, 37 N. J. L. 415, 18 Am. Rep. 729; Tidewater Co. *v.* Coster, 18 N. J. Eq. 518.

Ohio.—Lima *v.* Lima Cemetery Ass'n, 42 Ohio St. 128, 5 Am. & Eng. Corp. Cas. 547; Reeves *v.* Wood, 8 Ohio St. 333.

Oregon.—Oregon & C. R. Co. *v.* East Portland (Ore.), 46 Am. & Eng. Corp. Cas. 295.

Pennsylvania.—Hammett *v.* Philadephia, 65 Pa. St. 146, 3 Am. Rep. 615; *In re* Washington Ave. 69 Pa. St. 352; Seeley *v.* Pittsburgh, 82 Pa. St. 360.

Rhode Island.—Cleveland *v.* Tripp, 13 R. I. 50.

Vermont.—Boyden *v.* Brattleboro, 65 Vt. 504.

Benefit Must Accrue to Land, Not to Owner as Individual.—

Virginia.—Green *v.* Ward, 82 Va. 324.

Missouri.—Neenan *v.* Smith, 50 Mo. 529.

Illinois.—Louisville, etc., R. Co. *v.* East St. Louis, 134 Ill. 663.

Delegation of Power to Levy to Municipality.—It is well settled that the legislature may delegate its power to levy local assessments to the municipality.

United States.—Willard *v.* Presbury, 14 Wall. (U. S.) 676.

Alabama.—Irwin *v.* Mobile, 57 Ala. 6; Stein *v.* Mobile, 24 Ala. 591; Birmingham *v.* Klein, 89 Ala. 461, 32 Am. & Eng. Corp. Cas. 284.

Arkansas.—Little Rock *v.* Board of Imp., 42 Ark. 152.

California.—Sinton *v.* Ashbury, 41 Cal. 525.

Connecticut.—Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636.

Illinois.—Harvard *v.* St Clair, etc., Drainage Co., 51 Ill. 130; Hessler *v.* Drainage Com'rs, 53 Ill. 105; Gage *v.* Graham, 57 Ill. 144; Board of Directors *v.* Houston, 71 Ill. 318; Updike *v.* Wright, 81 Ill. 49; West Chicago Park Com'rs *v.* Western Union Tel. Co., 103 Ill. 33; Cornell *v.* People, 107 Ill. 372; Owners of Lands *v.* People, 113 Ill. 296; Wetherell *v.* Devine, Ill. 116 631; Wilson *v.* Board of Trustees, 133 Ill. 443; West Chicago Park Com'rs *v.* Sweet, 167 Ill. 326, 47 N. E. 728; White *v.* People, 94 Ill.604; McLean County *v.* Bloomington, 106 Ill. 209.

Indiana.—Indianapolis *v.* Mansur, 15 Ind. 112.

Iowa.—Warren *v.* Henly, 31 Iowa 31.

Kansas.—Atchison, etc., R. Co. *v.* Peterson, 5 Kan. App. 103, 48 Pac. Rep. 877.

Kentucky.—Lexington *v.* McQuillan, 9 Dana (Ky.) 513; Louisville *v.* Hyatt, 2 B. Mon. (Ky.) 178; Bradley *v.* McAtee, 7 Bush (Ky.) 667.

Louisiana.—Municipality No. 2 *v.* Dunn, 10 La. Ann. 57.

Maryland.—Burgess *v.* Pue, 2 Gill (Md.) 11; Alexander *v.* Baltimore, 5 Gill (Md.) 392.

Notes

Michigan.—Hoyt *v.* East Saginaw, 19 Mich. 39; School Furniture Co. *v.* Grand Rapids, 92 Mich. 564.

Minnesota.—Hennepin County *v.* Bartleson, 37 Minn. 343.

Missouri.—Eyerman *v.* Blakesley, 78 Mo. 145; St. Louis *v.* Clemens, 36 Mo. 467; Lockwood *v.* St. Louis, 24 Mo. 20; St. Joseph *v.* O'Donoghue, 31 Mo. 345; Egyptian Levee Co. *v.* Harding, 27 Mo. 495; Palmyra *v.* Morton, 25 Mo. 593.

Nebraska.—Darst *v.* Griffin, 31 Neb. 668; State *v.* Lancaster County, 4 Neb. 540; State *v.* Dodge County, 8 Neb. 124.

New Jersey.—State *v.* Trenton (N. J.), 43 Am. & Eng. Corp. Cas. 130.

New York.—Jones *v.* Tonawanda (N. Y.), 53 N. E. 280; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

North Carolina.—Raleigh *v.* Peace (N. Car.), 37 Am. & Eng. Corp. Cas. 360, 110 N. Car. 32; Wilmington *v.* Yopp, 71 N. Car. 76; Cain *v.* Davie Co. Com'rs, 86 N. Car. 8; Busbee *v.* Wake Co. Com'rs, 93 N. Car. 143.

Pennsylvania.—*Re* Amberson Ave., 179 Pa. 634, 36 Atl. 357; *In re* Washington Ave., 69 Pa. St. 352.

South Carolina.—Cruikshanks *v.* Charleston, 1 McCord L. (S. Car.) 225.

Tennessee.—Franklin *v.* Maberry, 6 Humph. (Tenn.) 368; Whyte *v.* Nashville, 2 Swan (Tenn.) 364; Washington *v.* Nashville, 1 Swan (Tenn.) 177.

Texas.—Galveston *v.* Heard, 54 Tex. 420; Adams *v.* Fisher, 63 Tex. 651, 14 Am. & Eng. Corp. Cas. 330; 75 Tex. 657, 22 Am. & Eng. Corp. Cas. 454.

Vermont.—Allen *v.* Drew, 44 Vt. 174.

Wisconsin.—State *v.* Portage, 12 Wis. 563; Johnson *v.* Milwaukee, 40 Wis. 315.

Same—Power Must Be Clearly Given.—But such delegation must be given clearly and definitely, or by unmistakable implication.

Alabama.—Birmingham *v.* Klein, 89 Ala. 461, 32 Am. & Eng. Corp. Cas. 284.

Illinois.—Chicago *v.* Law, 144 Ill. 576; Craw *v.* Tolono, 96 Ill. 255, 36 Am. Rep. 143; Wright *v.* Chicago, 20 Ill. 252.

Kentucky.—Caldwell *v.* Rupert, 10 Bush (Ky.) 179.

Minnesota.—Minn. Linseed Oil Co. *v.* Palmer, 20 Minn. 468.

Missouri.—Halpin *v.* Campbell, 71 Mo. 493.

New Jersey.—State *v.* Guttenberg, 39 N. J. L. 660.

New Mexico.—Albuquerque *v.* Zliger (N. Mex.), 27 Pac. Rep. 315.

New York.—Stebbins *v.* Kay, 123 N. Y. 31; *Re* Second Ave. Church, 66 N. Y. 395; Sharp *v.* Speir, 4 Hill (N. Y.) 76.

Ohio.—Lima *v.* Lima Cem. Ass'n, 42 Ohio St. 128.

Notes

Pennsylvania.—Reed *v.* Erie, 79 Pa. St. 346; Philadelphia *v.* Hoxie, 38 Pa. St. 339.

Texas.—Allen *v.* Galveston, 51 Tex. 302.

Virginia.—Green *v.* Ward, 82 Va. 324; Whiting *v.* West Point, 88 Va. 905.

Same—Not Implied from General Grants.—General grants of authority to municipalities conferring upon them the power of taxation and general powers of regulation do not convey this power by implication.

Alabama.—Lott *v.* Ross, 38 Ala. 156; Hare *v.* Kennerly, 83 Ala. 608.

Arkansas.—Vance *v.* Little Rock, 30 Ark. 439, 65 Am. Dec. 593.

Georgia.—Mayor, etc., of Savannah *v.* Hartridge, 8 Ga. 23; Augusta *v.* Murphey, 79 Ga. 101, 17 Am. & Eng. Corp. Cas. 621.

Illinois.—Wright *v.* Chicago, 20 Ill. 252; Chicago *v.* Wright, 32 Ill. 192; Chicago *v.* Law, 144 Ill. 575; Drake *v.* Phillips, 40 Ill. 388.

Indiana.—Nelson *v.* La Porte, 33 Ind. 258; Niklaus *v.* Conkling, 118 Ind. 289; Kyle *v.* Malin, 8 Ind. 34.

Iowa.—Fairfield *v.* Ratcliff, 20 Iowa 396.

Kansas.—Leavenworth *v.* Rankin, 2 Kan. 357; Simpson *v.* Kansas City, 46 Kan. 438, 37 Am. & Eng. Corp. Cas. 252.

Kentucky.—Caldwell *v.* Rupert, 10 Bush (Ky.) 179.

Maryland.—Annapolis *v.* Harwood, 32 Md. 471.

Minnesota.—Minnesota Linseed Oil Co. *v.* Palmer, 20 Minn. 468.

North Carolina.—Winston *v.* Taylor, 99 N. Car. 210.

New York.—Sharp *v.* Speir, 4 Hill (N. Y.) 76; *In re* Second Ave. M. E. Church, 66 N. Y. 395.

Ohio.—Reed *v.* Toledo, 18 Ohio 161; Cincinnati *v.* Bryson, 15 Ohio 625; Griswold *v.* Pelton, 34 Ohio State 482.

South Carolina.—Columbia *v.* Hunt, 5 Rich. (S. Car.) 550.

Virginia.—Richmond *v.* Daniel, 14 Gratt. (Va.) 387; Green *v.* Ward, 82 Va. 324.

Same—Statute Must Be Strictly Construed and Followed.—

Alabama.—Mobile *v.* Baldwin, 57 Ala. 61, 29 Am. Rep. 712; Lot *v.* Ross, 38 Ala. 156; Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441.

Arkansas.—Vance *v.* Little Rock, 30 Ark. 439.

California.—Bucknall *v.* Story, 36 Cal. 67; Emery *v.* San Fr. Gas Co., 28 Cal. 354; Taylor *v.* Donner, 31 Cal. 480.

Colorado.—Keese *v.* Denver, 10 Colo. 113.

Florida.—Moseley *v.* Tift, 4 Fla. 402.

Georgia.—Augusta *v.* Dunbar, 50 Ga. 387; Savannah *v.* Hartridge, 8 Ga. 23.

Illinois.—Merritt *v.* Kewanee, 175 Ill. 537, 51 N. E. 867; Chicago *v.* Wright, 32 Ill. 192; Wright *v.* Chicago, 20 Ill. 252; Drummer *v.*

Notes

Cox, 165 Ill. 648, 46 N. E. 716; Scammon *v.* Chicago, 40 Ill. 146; Ottawa *v.* Spencer, 40 Ill. 211; Hyde Park *v.* Borden, 94 Ill. 26; Gridley *v.* Bloomington, 88 Ill. 555, 30 Am. Rep. 566.

Indiana.—Nelson *v.* La Porte, 33 Ind. 258.

Iowa.—Dubuque *v.* Chicago, etc., R. Co., 47 Iowa 201; Jeffries *v.* Lawrence, 42 Iowa 498.

Kansas.—Burnes *v.* Atchison, 2 Kan. 454; Leavenworth *v.* Norton, 1 Kan. 432; Paine *v.* Spratley, 5 Kan. 525.

Kentucky.—Collins *v.* Louisville, 2 B. Mon. (Ky.) 134; Kniper *v.* Louisville, 7 Bush (Ky.) 599; Broadway Bapt. Church *v.* McAtee, 8 Bush (Ky.) 508.

Louisiana.—Barber Asph. Pav. Co. *v.* Watt (La.), 26 So. Rep. 70.

Maryland.—Annapolis *v.* Harwood, 32 Md. 471; Henderson *v.* Baltimore, 8 Md. 352.

Massachusetts.—Boston *v.* Schaffer, 9 Pick. (Mass.) 419.

Michigan.—Power's Appeal, 29 Mich. 504; Whitney *v.* Hudson, 69 Mich. 189.

Minnesota.—Sewall *v.* St. Paul, 20 Minn. 511.

Mississippi.—Jackson *v.* Newman, 59 Miss. 385, 42 Am. Rep. 367.

Missouri.—St. Louis *v.* Laughlin, 49 Mo. 559.

New Jersey.—State *v.* Jersey City, 26 N. J. L. 444; State *v.* Guttenberg, 39 N. J. L. 660.

New York.—*Re* Klock, 30 App. Div. 24, 51 N. Y. Supp. 897; Merritt *v.* Port Chester, 71 N. Y. 309, 27 Am. Rep. 47; Manice *v.* New York, 8 N. Y. 120; Bennett *v.* Buffalo, 17 N. Y. 385; Howell *v.* Buffalo, 15 N. Y. 512; Dyckman *v.* New York, 5 N. Y. 434; Sharpe *v.* Speir, 4 Hill (N. Y.) 76; *Re* Second Ave. M. E. Church, 66 N. Y. 395.

North Carolina.—Ashville *v.* Means, 7 Ired. (N. Car.) 406.

Ohio.—Zanesville *v.* Richards, 5 Ohio St. 589; Mays *v.* Cincinnati, 1 Ohio St. 268; Jonas *v.* Cincinnati, 18 Ohio 318.

Oregon.—Oregon S. N. Co. *v.* Portland, 2 Ore. 81.

South Carolina.—State *v.* Maysville, 12 S. Car. 76; Columbia *v.* Hunt, 5 Rich. (S. Car.) 550.

Tennessee.—Columbia *v.* Beasly, 1 Humph. (Tenn.) 240.

Texas.—Allen *v.* Galveston, 51 Tex. 318.

Vermont.—Henry *v.* Chester, 15 Vt. 460.

Virginia.—Orange, etc., R. Co. *v.* Alexandria, 17 Gratt. (Va.) 176; Richmond *v.* Daniel, 14 Gratt. (Va.) 387; Schoolfield *v.* Lynchburg, 78 Va. 366; Peters *v.* Lynchburg, 76 Va. 927; Violett *v.* Alexandria (Va.), 31 L. R. A. 382; Green *v.* Ward, 82 Va. 324; Kirkham *v.* Russell, 76 Va. 956.

Wisconsin.—Oshkosh City Ry. Co. *v.* Winnebago County, 89 Wis. 435, 61 N. W. 1107; Dean *v.* Gleason, 16 Wis. 1.

Notes

Same—View That Power Is Peculiarly A Municipal One.—Some authorities have held that the power of levying local assessments is a matter of strictly municipal regulation. Murnane *v.* City of St. Louis (Mo.), 46 Am. & Eng. Corp. Cas. 281; State *v.* Field, 99 Mo. 356; Taylor *v.* Palmer, 31 Cal. 252; People *v.* Lynch, 51 Cal. 15; People *v.* Houston, 54 Cal. 539.

Same—Municipality Cannot Delegate Such Power Where Judicial Discretion Is Required.—If discretion and judgment are to be exercised, either as to time or manner, the municipal body intrusted with the duty must exercise it, and cannot delegate it.

California.—Oakland *v.* Carpentier, 13 Cal. 540; Menser *v.* Risdon, 36 Cal. 239; Smith *v.* Morse, 2 Cal. 524; Richardson *v.* Heydenfeldt, 46 Cal. 68; People *v.* Clark, 47 Cal. 456; Randolph *v.* Gawley, 47 Cal. 458; People *v.* Ladd, 47 Cal. 603; Himmelmann *v.* McCreery, 51 Cal. 562; Bolton *v.* Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33.

Illinois.—Kuehner *v.* Freeport (Ill.), 43 Am. & Eng. Corp. Cas. 201; People *v.* Warneke, 173 Ill. 40, 50 N. E. 221; Foss *v.* Chicago, 56 Ill. 354; Jenks *v.* Chicago, 56 Ill. 397; Lake Shore, etc., R. Co. *v.* Chicago, 56 Ill. 454; Wright *v.* Chicago, 60 Ill. 312; McDonnell *v.* Chicago, 60 Ill. 350; Bryan *v.* Chicago, 60 Ill. 507; Bowen *v.* Chicago, 61 Ill. 268; Workmen *v.* Chicago, 61 Ill. 463; Walker *v.* Chicago, 62 Ill. 287; East St. Louis *v.* Wehrung, 50 Ill. 28.

Indiana.—Smith *v.* Duncan, 77 Ind. 92; Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396.

Kentucky.—Hydes *v.* Joyes, 4 Bush (Ky.) 464.

Maryland.—Baltimore *v.* Scarf, 54 Md. 499.

Michigan.—Scofield *v.* Lansing, 17 Mich. 437.

Minnesota.—Darling *v.* St. Paul, 19 Minn. 389; Minneapolis Gas Light Co. *v.* Minneapolis, 36 Minn. 159.

Missouri.—Ruggles *v.* Collier, 43 Mo. 353; St. Louis *v.* Clemens, 43 Mo. 395; Haegele *v.* Mallinckrodt, 46 Mo. 577; Thompson *v.* Booneville, 61 Mo. 282; Shehan *v.* Gleeson, 46 Mo. 100; St. Louis *v.* Clemens, 52 Mo. 133.

New Jersey.—State *v.* Paterson, 34 N. J. L. 163; State *v.* Jersey City, 1 Dutch. (N. J.) 309; Parker *v.* New Brunswick, 30 N. J. L. 395; State *v.* Trenton, 42 N. J. L. 74; State *v.* New Brunswick, 30 N. J. L. 395; State *v.* Patterson, 34 N. J. L. 163.

New York.—*In re* N. Y., etc., Trustees, 57 How. Pr. 500; Brooklyn *v.* Breslin, 57 N. Y. 591; Phelps *v.* New York, 112 N. Y. 216; Matter of Emigrant Industrial Sav. Bank, 75 N. Y. 393; Birdsall *v.* Clark, 73 N. Y. 73, 29 Am. Rep. 105; Thompson *v.* Schermerhorn, 6 N. Y. 92.

Pennsylvania.—Bradford *v.* Foster (C. P.), 5 Pa. Dist. R. 523.

Tennessee—Whyte *v.* Nashville, 2 Swan (Tenn.) 364.

Notes

Virginia.—McCrowell *v.* City of Bristol (Va.), 43 Am. & Eng. Corp. Cas. 149.

Contra.—Council may adopt report of assessors appointed by it, and such assessment will be deemed made by council. Smith *v.* Buffalo, 90 Hun (N. Y.) 118, 35 N. Y. Supp. 635.

Michigan.—Brown *v.* Saginaw (Mich.), 65 N. W. 601.

Same—Municipality May Delegate Ministerial Duties.—But those duties that are purely ministerial and do not require judicial discretion may be delegated by the municipality.

District of Columbia.—Walker *v.* Dist. of Columbia, 6 Mack. (D. C.) 352.

Arkansas.—Main *v.* Ft. Smith, 49 Ark. 480.

California.—Bolton *v.* Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33.

Connecticut.— Bartram *v.* Bridgeport, 55 Conn. 122.

Illinois.—Jacksonville R. Co. *v.* Jacksonville, 114 Ill. 562.

Iowa.— Burlington *v.* Quick, 47 Iowa 222; Stewart *v.* Council Bluffs, 58 Iowa 642.

Kentucky.—Nevin *v.* Roach, 86 Ky. 492.

Massachusetts.—Taber *v.* New Bedford, 135 Mass. 162; Collins *v.* Holyoke, 146 Mass. 289.

Michigan.—Cuming *v.* Grand Rapids, 46 Mich. 158; Baisch *v.* Grand Rapids, 84 Mich. 666; Davies *v.* Saginaw, 87 Mich. 439.

Minnesota.—Rogers *v.* St. Paul, 22 Minn. 494; State *v.* Ramsey Co. Dist. Ct., 33 Minn. 235.

Missouri.—Railroad Co. *v.* Marion Co., 36 Mo. 294; Sheehan *v.* Gleeson, 46 Mo. 100; St. Joseph *v.* Owen, 110 Mo. 445; Tipton *v.* Norman, 72 Mo. 380.

New Jersey.—State *v.* New Brunswick, 30 N. J. L. 395.

New York.—Burchell *v.* New York (Sup. Ct.), 9 N. Y. Supp. 196.

Pennsylvania.—Schenley *v.* Commonwealth, 36 Pa. St. 62.

Virginia.—Green *v.* Board, 82 Va. 324.

Constitutionality.—The question of legislative power to provide for local assessments has been discussed in most, if not all, of the courts, both state and federal, and the almost uniform holding is that the power exists, and, in the absence of any special constitutional restriction, is a valid exercise of the taxing power.

United States.—United States *v.* Memphis, 97 U. S. 284; Bauman *v.* Ross, 167 U. S. 548, 17 Sup. Ct. 966.

California.—Appeal of Piper, 32 Cal. 558.

Connecticut.— Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636.

Illinois.—Bedard *v.* Hall, 44 Ill. 91.

Indiana.—Turpin *v.* Eagle Creek, etc., Road Co., 48 Ind. 45; Sny-

Notes

der *v.* President, etc., of Rockport, 6 Ind. 240; Lafayette *v.* Fowler, 34 Ind. 140.

Kansas.—Parker *v.* Challiss, 9 Kan. 155.

Kentucky.—Louisville *v.* Hyatt, 5 B. Mon. (Ky.) 177; Bradley *v.* McAtee, 7 Bush (Ky.) 667.

Maryland.—Alexander *v.* Mayor, etc., of Baltimore, 5 Gill (Md.) 383; Moate *v.* Mayor, etc., of Baltimore, 5 Md. 314; Brooks *v.* Mayor, etc., of Baltimore, 48 Md. 265.

Massachusetts.—Dorgan *v.* Boston, 12 Allen (Mass.) 223; Wright *v.* Boston, 9 Cush. (Mass.) 233; Boston, etc., Soc. *v.* Boston, 116 Mass. 181; Boylston Market Assoc. *v.* Boston, 113 Mass. 528; Holt *v.* Somerville, 127 Mass. 408; Jones *v.* Boston, 104 Mass. 461; Prince *v.* Boston, 111 Mass. 226; Butler *v.* Worcester, 112 Mass. 541.

Minnesota.—Rogers *v.* St. Paul, 22 Minn. 494.

Mississippi.—Smith Aberdeen, 25 Miss. 458.

Missouri.—Uhrig *v.* St. Louis, 44 Mo. 458; St. Louis *v.* Clemens, 36 Mo. 467; Keith *v.* Bingham, 100 Mo. 300.

New Jersey.—State *v.* Dean, 23 N. J. L. 335; McLaughlin *v.* Miller, 124 N. Y. 510.

New York.—Manice *v.* Mayor, etc., of New York, 8 N. Y. 120; Howell *v.* Buffalo, 37 N. Y. 269; Rexford *v.* Knight, 15 Barb. 641; Litchfield *v.* McComber, 42 Barb. (N. Y.) 288; People *v.* Mayor, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

Ohio.—Corry *v.* Campbell, 25 Ohio St. 134; Northern Ind. R. Co. *v.* Connelly, 10 Ohio St. 160; Gest *v.* Cincinnati, 26 Ohio St. 275; Ernst *v.* Kunkle, 5 Ohio St. 520; Maloy *v.* Marietta, 11 Ohio St. 636.

Pennsylvania.—Stroud *v.* Philadelphia, 61 Pa. St. 257; Wray *v.* Mayor, etc., of Pittsburgh, 46 Pa. St. 365.

Rhode Island.—Deblois *v.* Barker, 4 R. I. 445; *In re* Dorrance St., 4 R. I. 230.

Virginia.—Violett *v.* Alexandria, 92 Va. 561, 31 L. R. A. 382.

Same—Due Process of Law.—In the United States courts it has been decided that where a mode of contesting the assessments, and notice thereof to the owner of the property, are provided for, they are not contrary to that provision of the constitution of the United States contained in the fourteenth amendment, to the effect that no person shall be deprived of his property without due process of law, or, as expressed by MILLER, J., in Davidson *v.* Board, 96 U. S. 97, "Whenever by the laws of a state or by state authority a tax, assessment, servitude or other burden is imposed upon the property for the public use, whether it be of the whole state or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary course of justice, with such notice to the person of such proceeding in

Notes

regard to the property as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law." Similar decisions are to be found in the state reports.

United States.—Fallbrook Irrig. Dist. *v.* Bradley, 164 U. S. 112, 17 Sup. Ct. 56; Paulson *v.* Portland, 149 U. S. 30; Lent *v.* Tillson, 140 U. S. 316, 37 Am. & Eng. Corp. Cas. 265; Wurts *v.* Hoagland, 114 U. S. 691; Kelly *v.* Pittsburgh, 104 U. S. 78; Spencer *v.* Merchant, 125 U. S. 345; Hagar *v.* Reclamation Dist., 111 U. S. 701; Walston *v.* Nevins, 128 U. S. 578, 27 Am. & Eng. Corp. Cas. 198; Davidson *v.* Board of Adm'rs, 96 U. S. 97; McMillen *v.* Anderson, 95 U. S. 37; Roach *v.* Nevin, 128 U. S. 578; Palmer *v.* McMahan, 133 U. S. 660; Scott *v.* Toledo, 36 Fed. Rep. 385; Murdock *v.* Cincinnati, 44 Fed. Rep. 726. *Compare* Mobile County *v.* Kimball, 102 U. S. 691.

California.—Hagar *v.* Yolo Co., 47 Cal. 234; Hutson *v.* Woodbridge Protection Dist., 79 Cal. 90, 16 Pac. Rep. 549; Lent *v.* Tillson, 72 Cal. 404, 19 Am. & Eng. Corp. Cas. 640; *In re* Madeira Irrig. Dist. Bonds, 92 Cal. 296.

Georgia.—Speer *v.* Athens, 85 Ga. 49, 32 Am. & Eng. Corp. Cas. 301.

Illinois.—Hyde Park *v.* Spencer, 118 Ill. 446; McChesney *v.* Hyde Park (Ill.), 28 N. E. Rep. 1102.

Indiana.—Garver *v.* Daussman, 114 Ind. 429; Reinken *v.* Fuehring, 130 Ind. 382, 37 Am. & Eng. Corp. Cas. 354; Law *v.* Johnson, 118 Ind. 261.

Iowa.—Gatch *v.* Des Moines, 63 Iowa 718, 18 N. W. 310; Stewart *v.* Polk Co., 30 Iowa 9.

Kentucky.—Nevin *v.* Roach, 86 Ky. 492.

Maryland.—Ulman *v.* Baltimore, 72 Md. 609.

Massachusetts.—Allen *v.* Charlestown, 111 Mass. 123; Hildreth *v.* Lowell, 11 Gray (Mass.) 345.

Minnesota.—St. Paul *v.* Nickl, 42 Minn. 262.

Missouri.—Springfield Cent. Nat. Bank *v.* Weaver, 137 Mo. 650, 37 S. W. 509; St Louis *v.* Ranken, 96 Mo. 497; Eyerman *v.* Blaksley, 78 Mo. 145.

Nebraska.—Hurford *v.* Omaha, 4 Neb. 336.

New York.—*Re* De Peyster, 80 N. Y. 565; Stuart *v.* Palmer, 74 N. Y. 184; *In re* Ryers, 72 N. Y. 1; Town of Guilford *v.* Cornell, 18 Barb. (N. Y.) 615; Astor *v.* New York, 37 N. Y. Sup. Ct. 539; Matter of Amsterdam, 126 N. Y. 158.

Ohio.—Emery *v.* Cincinnati, 6 Ohio Dec. 44, 4 Ohio N. P. 220.

Oregon.—Paulsen *v.* Portland, 16 Ore. 450.

South Dakota.—Tripp *v.* Yankton, 10 S. Dak. 516, 74 N. W. 447.

Texas.—Lovenberg *v.* Galveston (Tex.), 42 S. W. Rep. 1024.

Virginia.—Davis *v.* Lynchburg, 84 Va. 861.

Notes

Washington.—Hansen *v.* Hammer, 15 Wash. 315, 46 Pac. 332.

Wisconsin.—Meggett *v.* Eau Claire, 81 Wis. 326; State *v.* Stewart, 74 Wis. 620, 28 Am. & Eng. Corp. Cas. 310.

Same — Same — Assessment Exceeding Benefit.—But where the assessment exceeds the benefit, there is a taking of property without due process of law to the extent of such excess.

United States.—Fay *v.* Springfield (C. C.), 94 Fed. Rep. 40, 2 Mun. Corp. Cas. 162; Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187.

California.—Creighton *v.* Manson, 27 Cal. 624; Lent *v.* Tillson, 72 Cal. 441.

Louisiana.—*In re* N. O. Drainage Co., 11 La. Ann. 373.

Massachusetts.—Sears *v.* Street Com'rs of Boston (Mass.), 2 Mun. Corp. Cas. 184; Weed *v.* Boston (Mass.), 51 N. E. 204; Mt. Auburn Cemetery *v.* Cambridge, 150 Mass. 12, 22 N. E. 66; Boston *v.* Boston & A. R. Co., 170 Mass. 95, 49 N. E. 95.

Michigan.—Thomas *v.* Gain, 35 Mich. 155; White *v.* Saginaw, 67 Mich. 33.

Minnesota.—State *v.* Dist. Ct. of Ramsey Co. (Minn.), 79 N. W. 971.

New Jersey.—New Brunswick Rubber Co. *v.* Com'rs, 38 N. J. L. 190; Tidewater Co. *v.* Coster, 18 N. J. Eq. 528; State *v.* Newark, 37 N. J. L. 422.

New York.—Matter of Canal St., 11 Wend. (N. Y.) 155.

Texas.—Hutcheson *v.* Storrie (Tex.), 51 S. W. 848.

Vermont.—Barnes *v.* Dyer, 56 Vt. 469.

Same—Uniformity and Equality of Taxation.—The general provisions of the constitutions of the various states that taxation shall be uniform and equal and assessed upon property in proportion to its value are only applicable for purposes of revenue alone, and are not intended to embrace local assessments where the property assessed is supposed to receive immediate and especial benefits.

United States.—Louisiana *v.* Pilsbury, 105 U. S. 290; Boro *v.* Phillips Co., 4 Dill. (U. S.) 216.

Alabama.—Mayor, etc., *v.* Klein, 89 Ala. 461, 32 Am. & Eng. Corp. Cas. 484; Mobile *v.* Dorgan, 45 Ala. 310.

California.—*In re* Madera Irrig. Dist. Bonds, 92 Cal. 296; Jennings *v.* Le Breton, 80 Cal. 15; Hagar *v.* Yolo Co., 47 Cal. 234; Walsh *v.* Mathews, 29 Cal. 123; Burnett *v.* Sacramento, 12 Cal. 76; Emery *v.* San Francisco Gas Co., 28 Cal. 346; Creighton *v.* Manson, 27 Cal. 613; Taylor *v.* Palmer, 31 Cal. 240; Appeal of Piper, 32 Cal. 530; Chambers *v.* Satterlee, 40 Cal. 497; Mahoney *v.* Braverman, 54 Cal. 565; People *v.* Lynch, 51 Cal. 15; People *v.* Naglee, 1 Cal. 232, 52 Am. Dec. 312.

Colorado.—Denver *v.* Knowles, 17 Colo. 204 (overruling earlier

Notes

decisions *contra.*); City of Pueblo *v.* Robinson, 12 Colo. 593, 28 Am. & Eng. Corp. Cas. 320.

Connecticut.—Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255; Nichols *v.* Bridgeport, 23 Conn. 189.

Florida.—Edgerton *v.* Green Cove Springs, 19 Fla. 140.

Georgia.—Bacon *v.* Savannah, 86 Ga. 305; Speer *v.* Athens, 85 Ga. 49, 32 Am. & Eng. Corp. Cas. 301; First Methodist Church *v.* Atlanta, 76 Ga. 181; Hayden *v.* Atlanta, 70 Ga. 817, 7 Am. & Eng. Corp. Cas. 228.

Illinois.—Wright *v.* Chicago, 46 Ill. 44; Canal Trustees *v.* Chicago, 12 Ill. 406; Peoria *v.* Kidder, 26 Ill. 357; Fagan *v.* Chicago, 84 Ill. 234; Bigelow *v.* Chicago, 90 Ill. 53; White *v.* People, 94 Ill. 604; Craw *v.* Tolono, 96 Ill. 255; Enos *v.* Springfield, 113 Ill. 65; Galesburg *v.* Searles, 114 Ill. 217; Watson *v.* Chicago, 115 Ill. 78; Sterling *v.* Galt, 117 Ill. 15; Murphy *v.* People, 120 Ill. 234; Springfield *v.* Green, 120 Ill. 269.

Indiana.—Palmer *v.* Stumph, 29 Ind. 329; Bright *v.* McCullough, 27 Ind. 223; Goodrich *v.* Winchester & D. Turnpike Co., 26 Ind. 119; Anderson *v.* Kerns Drain Co., 14 Ind. 201; State Bank *v.* New Albany, 11 Ind. 142; Reinken *v.* Fuehring, 130 Ind. 382, 37 Am. & Eng. Corp. Cas. 354.

Iowa.—Fairfield *v.* Ratcliffe, 20 Iowa 396.

Kansas.—Newman *v.* Emporia, 41 Kan. 583; Ottawa Co. *v.* Nelson, 19 Kan. 240; Burnes *v.* Atchison, 2 Kan. 449; Ottawa *v.* Barney, 10 Kan. 279; Newton *v.* Atchison, 31 Kan. 151; Hines *v.* Leavenworth, 3 Kan. 186; Emporia *v.* Bates, 16 Kan. 495; Paine *v.* Spratley, 5 Kan. 546.

Kentucky.—Louisville *v.* Hyatt, 2 B. Mon. (Ky.) 177; Malchus *v.* Highlands, 4 Bush (Ky.) 547; Lexington *v.* McQuillian, 9 Dana (Ky.) 513.

Louisiana.—Missouri, K. & T. Trust Co. *v.* Smart (La.), 25 So. 443; Ellis *v.* Ponchartrain Levee Dist., 43 La. Ann. 33; Munson *v.* Atchafalaya Basin Levee Dist., 43 La. Ann. 15; Barber Aph. Pav. Co. *v.* Gogreve, 41 La. Ann. 251; Excelsior Planting, etc., Co. *v.* Green, 39 La. Ann. 455; *Re* New Orleans, 20 La. Ann. 497; Richardson *v.* Morgan, 16 La. Ann. 429; Wallace *v.* Shelton, 14 La. Ann. 503; Surgi *v.* Suetchman, 11 La. Ann. 387; New Orleans D. Co. Case, 11 La. Ann. 370; Yeatman *v.* Crandall, 11 La. Ann. 220; Municipality *v.* Dunn, 10 La. Ann. 57; Crowley *v.* Copley, 2 La. Ann. 329.

Maine.—Dyar *v.* Farmington, 70 Me. 522; Auburn *v.* Paul, 84 Me. 212.

Maryland.—Brooks *v.* Baltimore, 48 Md. 268; Baltimore *v.* Greenmount Cem., 7 Md. 517.

Massachuetts.—Holt *v.* Somerville, 127 Mass. 408; Dorgan *v.* Boston, 12 Allen (Mass.) 223; Lowell *v.* Hadley, 8 Met. (Mass.) 191.

Notes

Michigan.—Hoyt *v.* East Saginaw, 19 Mich. 42; Motz *v.* Detroit, 18 Mich. 522; Woodbridge *v.* Detroit, 8 Mich. 276; Lefevre *v.* Detroit, 2 Mich. 596; Williams *v.* Detroit, 2 Mich. 564.

Minnesota.—State *v.* St. Louis Co. Dist. Ct., 61 Minn. 542, 64 N. W. 190; Maultby *v.* Tantges, 50 Minn. 248; Hennepin Co. *v.* Bartleson, 37 Minn. 343; State *v.* Hennepin Co. Dist. Ct., 33 Minn. 235; Noonan *v.* Stillwater, 33 Minn. 198; Guilder *v.* Otsego, 20 Minn. 74.

Mississippi.—Macon *v.* Patty, 57 Miss. 378; Williams *v.* Cammack, 27 Miss. 209; Daily *v.* Swope, 47 Miss. 367; Vasser *v.* George, 47 Miss. 713; Alcom *v.* Hamer, 38 Miss. 652; Smith *v.* Aberdeen, 25 Miss. 458.

Missouri.—St. Joseph *v.* Owen, 110 Mo. 445; Rutherford *v.* Hamilton, 97 Mo. 548; Farrar *v.* St. Louis, 80 Mo. 379; St. Joseph *v.* Anthony, 30 Mo. 537; Lockwood *v.* St. Lewis, 24 Mo. 22; St. Joseph *v.* O'Donoghue, 31 Mo. 345; Sheehan *v.* Hospital, 50 Mo. 155; Palmyra *v.* Morton, 25 Mo. 593; Newby *v.* Platt Co., 25 Mo. 258; Adams *v.* Lindell, 72 Mo. 198; Garrett *v.* St. Louis, 25 Mo. 505; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495.

Nebraska.—State *v.* Lancaster Co. Com'rs, 4 Neb. 450; State *v.* Dodge Co., 8 Neb. 124; Hurford *v.* Omaha, 4 Neb. 336.

Nevada.—*Ex p.* Cohn, 13 Nev. 424; *Ex p.* Robinson, 12 Nev. 263.

New Jersey.—State Board of Assessors *v.* Central R. Co., 48 N. J. L. 146; Cable Co. *v.* Atty. Gen., 46 N. J. Eq. 273; State *v.* Elizabeth, 51 N. J. L. 246; State *v.* Drainage Co., 45 N. J. L. 93; *Re* Pequest River Drainage, 41 N. J. L. 75; State *v.* Passaic, 41 N. J. L. 91; State *v.* Paterson Ave. Com'rs, 41 N. J. L. 83; Paterson *v.* Society, etc., 24 N. J. L. 385; State *v.* Newark, 27 N. J. L. 187; State *v.* Jersey City, 24 N. J. L. 662; State *v.* Dean, 23 N. J. L. 335.

New York.—People *v.* Lawrence, 41 N. Y. 140; Litchfield *v.* Vernon, 41 N. Y. 123; People *v.* Brooklyn, 4 N. Y. 419; Matter of Furman St., 17 Wend. (N. Y.) 649; Livingston *v.* New York, 8 Wend. (N. Y.) 85; Matter of New York, 11 Johns (N. Y.) 77; Sharp *v.* Speir, 4 Hill (N. Y.) 76; Brown *v.* New York, 63 N. Y. 239; Howell *v.* Buffalo, 37 N. Y. 267.

North Carolina.—Raleigh *v.* Peace, 110 N. Car. 32, 37 Am. & Eng. Corp. Cas. 360; Busbee *v.* Wake Co., 93 N. Car. 143; Cain *v.* Davie Co., 86 N. Car. 8; Shuford *v.* Lincoln Co., 86 N. Car. 552; Wilmington *v.* Yopp, 71 N. Car. 76.

North Dakota.—Ralph *v.* Fargo (N. Dak.), 76 N. W. 242.

Ohio.—Carlisle *v.* Hetherington, 47 Ohio St. 235; State *v.* Warren County Comrs., 17 Ohio St. 561; Maloy *v.* Marietta, 11 Ohio St. 636; Baker *v.* Cincinnati, 11 Ohio St. 34; Northern Ind. R. Co. *v.* Connelly, 10 Ohio St. 159; Reeves *v.* Wood County, 8 Ohio St. 333; Marion *v.* Epler, 5 Ohio St. 250; Hill *v.* Higdon, 5 Ohio St. 243; Ernst *v.* Kunkle, 5 Ohio St. 520; Scoville *v.* Cleveland, 1 Ohio St. 128.

Notes

Oregon.—Cook *v.* Portland, 20 Ore. 580; King *v.* Portland, 2 Ore. 146.

Pennsylvania.—Beaumont *v.* Wilkes Barre City, 142 Pa. St. 198; Chester *v.* Black, 132 Pa. St. 568; Sharpless *v.* Philadelphia, 21 Pa. 174, 59 Am. Dec. 759; Hammett *v.* Philadelphia, 65 Pa. 155; Com. *v.* Woods, 44 Pa. 113; Schenley *v.* Allegheny, 25 Pa. 130; Huidekoper *v.* Meadville, 83 Pa. St. 156; Seely *v.* Pittsburgh, 82 Pa. 360; Pittsburgh Orphan Asylum's App., 111 Pa. 135; Erie City *v.* Reed, 113 Pa. 468; *In re* Washington Ave., 69 Pa. 352.

Rhode Island.—Cleveland *v.* Tripp, 13 R. I. 50; Beals *v.* Providence Rubber Co., 11 R. I. 384.

South Dakota.—Winona, etc., R. Co. *v.* Watertown, 1 S. Dak. 46.

Texas.—Taylor *v.* Boyd, 63 Tex. 533; Adams *v.* Fisher, 63 Tex. 651, 14 Am. & Eng. Corp. Cas. 330; Texas Transp. Co. *v.* Boyd, 67 Tex. 153; Roundtree *v.* Galveston, 42 Tex. 612; Allen *v.* Galveston, 51 Tex. 320.

Vermont.—Allen *v.* Drew, 44 Vt. 174.

Virginia.—Violett *v.* Alexandria, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909; Richmond, etc., R. Co. *v.* Lynchburg, 81 Va. 473, 14 Am. & Eng. Corp. Cas. 323; Davis *v.* Lynchburg, 84 Va. 861; Sand *v.* Richmond, 31 Gratt. 574; Eyre *v.* Jocob, 14 Gratt. 427; Gilkeson *v.* Frederick Justices, 13 Gratt. 577; Norfolk *v.* Ellis, 26 Gratt. (Va.) 224. (*Compare* Norfolk *v.* Chamberlain, 89 Va. 196, 39 Am. & Eng. Corp. Cas. 614.)

Washington.—Howell *v.* Tacoma, 3 Wash. 711; City of Spokane Falls *v.* Browne, 3 Wash. 84; Austin *v.* Seattle, 2 Wash. 667.

West Virginia.—Douglass *v.* Harrisville, 9 W. Va. 165, 27 Am. Rep. 548.

Wisconsin.—Meggett *v.* Eau Claire, 81 Wis. 326; Teegarden *v.* Racine, 56 Wis. 545; Warner *v.* Knox, 50 Wis. 434; Dalrymple *v.* Milwaukee, 53 Wis. 178; Johnson *v.* Milwaukee, 40 Wis. 315; Hale *v.* Kenosha, 29 Wis. 599; Bond *v.* Kenosha, 17 Wis. 284; Weeks *v.* Milwaukee, 10 Wis. 242; Soens *v.* Racine, 10 Wis. 271; Lumsden *v.* Cross, 10 Wis. 282.

Contra, *Arkansas.*—Peay *v.* Little Rock, 32 Ark. 31 (overruling McGehee *v.* Mathis, 21 Ark. 40); Monticello *v.* Banks, 48 Ark. 251; Davis *v.* Gains, 48 Ark. 382.

Tennessee.—Taylor *v.* Chandler, 9 Heisk. (Tenn.) 349.

Same—Taking Property without Compensation.—Some authorities have held in regard to the objection that the levying of local assessments is in violation of the constitutional prohibition against taking private property for public use without just compensation, that the answer is that these assessments must be referred to the general power of taxation, and not to the right of eminent domain, and therefore such prohibition does not apply.

Notes

California.—Hagar *v.* Sup'rs, 47 Cal. 234.

Connecticut.—Nichols *v.* Bridgeport, 23 Conn. 189.

Georgia.—Speer *v.* Athens, 85 Ga. 49, 32 Am. & Eng. Corp. Cas. 301.

Illinois.—White *v.* People, 94 Ill. 604; Peoria *v.* Kidder, 26 Ill. 351.

Iowa.—Warren *v.* Henly, 31 Iowa 31.

Kentucky.—Covington *v.* Worthington, 88 Ky. 206; Howell *v.* Bristol, 8 Bush (Ky.) 493; Lexington *v.* McQuillan, 9 Dana (Ky.) 513; Sutton *v.* Louisville, 5 Dana (Ky.) 28.

Maryland.—Baltimore *v.* Greenmount Cemetery Co., 7 Md. 517.

Massachusetts.—Jones *v.* Boston, 104 Mass. 461.

Michigan.—School Furniture Co. *v.* Grand Rapids, 92 Mich. 571; Woodbridge *v.* Detroit, 8 Mich. 278.

Missouri.—Uhrig *v.* St. Louis, 44 Mo. 458; Keith *v.* Bingham, 100 Mo. 300; Garrett *v.* St. Louis, 25 Mo. 505.

Mississippi.—Griffin *v.* Dogan, 48 Miss. 11.

Ohio.—Maloy *v.* Marietta, 11 Ohio St. 636; Reeves *v.* Wood County, 8 Ohio St. 333; Hill *v.* Higdon, 5 Ohio St. 243; Scoville *v.* Cleveland, 1 Ohio St. 126.

Pennsylvania.—*In re* Washington Avenue, 69 Pa. St. 352.

Rhode Island.—*In re* Dorrance Street, 4 R. I. 230.

Vermont.—Allen *v.* Drew, 44 Vt. 187.

Wisconsin.—Holton *v.* Milwaukee, 31 Wis. 27.

New York.—Darlington *v.* New York, 31 N. Y. 190; People *v.* Lawrence, 41 N. Y. 140; Guilford *v.* Cornell, 18 Barb. (N. Y.) 615; People *v.* Brooklyn, 4 N. Y. 419, 54 Am. Dec. 266; Litchfield *v.* Vernon, 41 N. Y. 123; Bank *v.* Rome, 18 N. Y. 44; Mann *v.* Ultea, 44 How. Pr. (N. Y.) 341.

New Jersey.—State *v.* Newark, 35 N. J. L. 168; State *v.* Fuller, 34 N. J. L. 227.

But in Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187, it was held that the constitutional provision against taking property without due compensation was violated by an assessment substantially exceeding the benefit accruing from the improvement. See also Fay *v.* Springfield (C.C.), 2 Mun. Corp. Cas. 162, 94 Fed. Rep. 40; Cain *v.* Omaha, 42 Neb. 120, 60 N. W. 368; Chamberlain *v.* Cleveland, 34 Ohio St. 560; Hanscom *v.* Omaha, 11 Neb. 41; Zoeller *v.* Kellogg, 4 Mo. App. 163; Tidewater Co. *v.* Coster, 18 N. J. Eq. 527; Louisville *v.* Louisville Rolling Mill Co., 3 Bush (Ky.) 416; Excelsior Planting, etc., Co. *v.* Green, 39 La. Ann. 455.

Improvements for Which Assessments May Be Levied.

(1) Streets.

(*a.*) *Opening.*

The cost of the land taken for opening a street may be assessed against the abutting owners. Lafayette *v.* Fowler, 34 Ind. 140;

Notes

Alexander *v.* Baltimore, 5 Gill (Md.) 383; Dorgan *v.* Boston, 12 Allen (Mass.) 223; Fairchild *v.* St. Paul, 46 Minn. 540; Kansas City *v.* Baird, 98 Mo. 215; *In re* Twenty-sixth Street, 12 Wend. (N. Y.) 203; *In re* Degraw Street, 18 Wend. (N. Y.) 568; McMasters *v.* Commonwealth, 3 Watts (Pa.) 292; Wray *v.* Pittsburgh, 46 Pa. St. 365.

(*b.*) *Improvements in General.*

Such improvements as grading, filling, paving, etc., are properly assessable against the abutting property.

United States.—Willard *v.* Presbury, 14 Wall. (U. S.) 676; Lent *v.* Tilson, 140 U. S. 316; Willard *v.* Presbury, 14 Wall. (U. S.) 676.

Arkansas.—McGehee *v.* Mathis, 21 Ark. 40.

California.—Emery *v.* San Francisco Gas Co., 28 Cal. 345; Burnett *v.* Sacremento, 73 Am. Dec. 518, 12 Cal. 76.

Indiana.—Lafayette *v.* Fowler, 34 Ind. 140; Montgomery Co. *v.* Fuller, 111 Ind. 412, 19 Am. & Eng. Corp. Cas. 669.

Iowa.—Dewey *v.* Des Moines, 101 Iowa 416, 70 N. W. 605.

Kansas.—Hines *v.* Leavenworth, 3 Kan. 186.

Kentucky.—Lexington *v.* McQuillan, 9 Dana (Ky.) 514, 35 Am. Dec. 159.

Louisiana.—Charnock *v.* Fordoche, etc., Dist. Co., 38 La. Ann. 323; Shreveport *v.* Prescott (La.), 2 Mun. Corp. 39—,26 So. 664.

The paving of the roadbed of a street-railway is not assessable. Shreveport *v.* Prescott (La.), 2 Mun. Corp. Cas. 370.

Maryland.—Moale *v.* Baltimore, 5 Md. 314, 61 Am. Dec 276; Alexander *v.* Mayor, 46 Am. Dec. 630, 5 Gill (Md.) 383.

Massachusetts.—Jones *v.* Boston, 104 Mass. 461.

Minnesota—Sewall *v.* St. Paul, 20 Minn. 511.

Mississippi.—Macon *v.* Patty, 57 Miss. 378.

Missouri.—Palmyra *v.* Morton, 25 Mo. 593; Eyerman *v.* Blakesley, 78 Mo. 145.

Nebraska.—Hurford *v.* Omaha, 4 Neb. 336.

New Jersey.—State *v.* Atlantic City, 34 N. J. L. 99; *In re* Com'rs of Elizabeth, 49 N. J. L. 488.

New York.—*In re* Dugro, 50 N. Y. 513; People *v.* Brooklyn, 4 N. Y. 419; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

North Carolina.—Busbee *v.* Wake Co., 93 N. Car. 143.

Ohio.—Reeves *v.* Wood Co , 8 Ohio St. 333; Hill *v.* Higdon, 67 Am. Dec. 289, 5 Ohio St. 243.

Oregon.—King *v.* City, 2 Ore. 146.

Pennsylvania.—*In re* Extension of Hancock St., 18 Pa. St. 26; McGonigle *v.* Allegheny, 44 Pa. St. 118; Wray *v.* Pittsburgh, 46 Pa. St. 365; Schenley *v.* Com., 36 Pa. St. 29; Com. *v.* Woods, 44 Pa. St. 113.

Rhode Island.—Cleveland *v.* Tripp, 13 R. I. 50.

Notes

Texas.—Galveston *v.* Heard, 54 Tex. 420.

Virginia.—Violett *v.* Alexandria, 92 Va. 561, 53 Am. St. Rep. 825; Richmond, etc., R. Co. *v.* Lynchburg, 81 Va. 473.

Wisconsin.—Wright *v.* Forstal (Wis.), 27 N. W. Rep. 52.

But the improvement of a street which is already in good order in order that it may be used by the public generally is not assessable against the property owners. *In re* Washington Avenue, 69 Pa. St. 352, 8 Am. Rep. 255; Hammett *v.* Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615.

(*c.*) *Repaving and Repairing.*

Some authorities hold that the power of improving streets is a continuing one, and implies the power of doing the necessary repairing and repaving, and that therefore the city does not its exaust right to assess improvements on the abutting property by once exercising it, but may also make an assessment for repairs and repaving. Willard *v.* Presbury, 14 Wall. (U. S.) 676 ; Regenstein *v.* Atlanta, 98 Ga. 167, 25 S. E. 428; Gurnel *v.* Chicago, 40 Ill. 170; Kokomo *v.* Mahan, 100 Ind. 242; Yeakel *v.* Lafayette, 48 Ind. 116; Lafayette *v.* Fowler, 34 Ind. 140; Coates *v.* Dubuque (Iowa), 27 N. W. 750; Broadway Baptist Church *v.* McAtee, 8 Am. Rep. 480, 4 Bush (Ky.) 508; Municipality No. 2 *v.* Dunn, 10 La. Ann. 57; Wilkins *v.* Detroit, 46 Mich. 120; Sheley *v.* Detroit, 45 Mich. 434; Williams *v.* Detroit, 2 Mich. 581; McCormack *v.* Patchin, 53 Mo. 33, 14 Am. Rep. 440; Estes *v.* Owen, 90 Mo. 113; State *v.* Newark, 49 N. J. L. 239; Adams *v.* Fisher, 75 Tex. 657; Blount *v.* Jonesville, 31 Wis. 648; Warner *v.* Knox, 50 Wis. 429.

Same—Rule in Pennsylvania.

The Pennsylvania courts hold that where a street has once been opened and paved the municipality cannot charge the abutting owners with the cost of repairing it. Williamsport *v.* Beck, 128 Pa. St. 147, 27 Am. & Eng. Corp. Cas. 138; Alcom *v.* Philadelphia, 112 Pa. St. 494, 15 Am. & Eng. Corp. Cas. 178; Philadelphia *v.* Ehret, 153 Pa. St. 1, 25 Atl. Rep. 888 ; Harrisburg *v.* Segelbaum, 151 Pa. St. 172, 24 Atl. Rep. 1070; Boyer *v.* Reading, 151 Pa. St. 185, 24 Atl. Rep. 1075; Hammett *v.* Philadelphia, 65 Pa. St. 146 3 Am. Rep. 615; Prot. Orph. Asylum's Appeal, 111 Pa. St. 135. *In re* Washington Ave. 69 Pa. St., 352, 8 Am. Rep. 255.

Nor is the paving of suburban streets an improvement for which a local assessment may be levied. Philadelphia *v.* Sheridan (Pa.), 80 Atl. Rep. 24.

(*d.*) *Street Crossings and Crosswalks.*

The cost of paving street-crossings is assessable against the abutting property. Creighton *v.* Scott, 14 Ohio St. 438; Williams *v.* Detroit, 2 Mich. 560 ; Powell *v.* St. Joseph, 31 Mo. 347 ; State *v.*

Notes

Elizabeth, 30 N. J. L. 365. *Contra*, Moale *v.* Baltimore, 61 Md. 224, 4 Am. & Eng. Corp. Cas. 544.

Crosswalks may be paved and repaved at the expense of the abutting owners. *In re* Eager, 46 N. Y. 100; Hines *v.* Lockport, 41 How. Pr. (N. Y.) 435; *In re* Phillips, 60 N. Y. 16; *In re* Burke, 62 N. Y. 224.

(*e.*) *Sweeping and Sprinkling.*

The sweeping of streets is an improvement the cost of which is assessable. Reinken *v.* Fuehring, 130 Ind. 382, 37 Am. & Eng. Corp. Cas. 354, 30 N. E. 414.

In Sears *v.* Boston (Mass.), 1 Mun. Corp. Cas. 497, it was held that a local assessment might be levied for the cost of sprinkling a street, and also in State *v.* Reis, 38 Minn. 371, 20 Am. & Eng. Corp. Cas. 473.

But a contrary view was upheld in Chicago *v.* Blair (Ill.), 36 N. E. 289; Pettit *v.* Duke (Utah), 37 Pac. Rep. 568; New York L. Ins. Co. *v.* Prest (C. C.), 71 Fed. Rep. 815.

(*f.*) *Lighting.*

A municipality may provide for the payment by special assessments of so much of a plant for lighting its streets by electricity as relates to the placing, erection and construction of poles, electric conductors, street lamps and all the appurtenances thereto not included in the power-house or the generator-plant. Ewart *v.* Village of Western Springs, 180 Ill. 318, 54 N. E. 478. See also Jonas *v.* Cincinnati, 18 Ohio 318.

(2.) Sidewalks.

The laying of sidewalks is an assessable improvement. Dyer *v.* Chase, 52 Cal. 440; Palmer *v.* Way, 6 Colo. 106; White *v.* People, 94 Ill. 604; Royce *v.* Aplington (Iowa), 57 N. W. Rep. 868; Hackworth *v.* Louisville Artf. Stone Co. (Ky.), 50 S. W. Rep. 33; Hydes *v.* Joyes, 4 Bush (Ky.) 464; O'Leary *v.* Sloo, 7 La. Ann. 25; Henderson *v.* Baltimore, 8 Md. 352; Boston *v.* Shaw, 1 Met. (Mass.) 630; Lowell *v.* Hadley, 8 Met. (Mass.) 180; Downer *v.* Boston, 6 Cush. (Mass.) 277; Goddard, Petitioner, 16 Pick. (Mass.) 504; Woodbridge *v.* Detroit, 8 Mich. 274; Macon *v.* Patty, 57 Miss. 378; State *v.* Jersey City, 37 N. J. L. 128; Paxson *v.* Sweet, 13 N. J. L. 196; Hart *v.* Brooklyn, 36 Barb. (N. Y.) 226; Bonsall *v.* Lebanon, 19 Ohio 418; Buffalo City Cem. *v.* Buffalo, 46 N. Y. 503; Philadelphia *v.* Pa. Hospital, 143 Pa. St. 367; Wilkinsburg *v.* Home, etc., 131 Pa. St. 109; Greensburg *v.* Young, 53 Pa. St. 280; *In re* Dorrance St., 4 R. I. 130; Deblois *v.* Barker, 4 R. I. 445; Washington *v.* Nashville, 1 Swan (Tenn.) 177; Mayor *v.* Maberry, 6 Hump. (Tenn.) 368; Whyte *v.* Nashville, 2 Swan (Tenn.) 364; Sands *v.* Richmond, 31 Gratt. (Va.) 571.

(3) Sewers.

It is well settled that assessments proportioned to the special benefit received may be levied for the construction of sewers.

Notes

England.—Reg. *v.* Warton, 2 B. & S. 719, 110 E. C. L. 718; Met. Bd. of Works *v.* Vauxhall Bridge Co., 7 El. & Bl. 964, 90 E. C. L. 964; Soady *v.* Wilson, 3 Ad. & El. 248, 30 E. C. L. 89; St. Katherine Dock Co. *v.* Higgs, 10 Q. B. 641, 59 E. C. L. 639; Hammersmith Bridge Co. *v.* Overseers, L. R. 6 Q. B. 230; Reg. *v.* Norfolk County, 15 Q. B. 549, 69 E. C. L. 547.

California.—Emery *v.* Reed, 65 Cal. 351.

Colorado.—Keese *v.* Denver, 10 Colo. 112; Pueblo *v.* Robinson, 12 Colo. 593, 28 Am. & Eng. Corp. Cas. 320.

Connecticut.—Clapp *v.* Hartford, 35 Conn. 62; Cone *v.* Hartford, 28 Conn. 363; Hungerford *v.* Hartford, 39 Conn. 279; Ferguson *v.* Stamford, 60 Conn. 432.

Delaware.—English *v.* Wilmington (Del. 1896), 37 Atl. Rep. 157.

Georgia.—Atlanta *v.* Gabbett, 93 Ga. 266.

Illinois.—Walker *v.* Aurora, 140 Ill. 402; McChesney *v.* Hyde Park, 151 Ill. 634; Springfield *v.* Sale, 127 Ill. 359; Rich *v.* Chicago, 152 Ill. 18.

Indiana.—Allen County *v.* Silvers, 22 Ind. 491; Coburn *v.* Bossert (Ind. App.), 40 N. E. 281; Elkhart *v.* Wickwire, 121 Ind. 331; Crawfordsville Music Hall Assoc. *v.* Clements, 12 Ind. App. 464; Kirkland *v.* Board of Public Works, 142 Ind. 123.

Iowa.—Grimmell *v.* Des Moines, 57 Iowa 144.

Kansas.—Mason *v.* Spencer, 35 Kan. 512.

Louisiana.—Davis *v.* New Orleans, 40 La. Ann. 806.

Massachusetts.—Beals *v.* Brookline (Mass.), 54 N. E. 339; Wright *v.* Boston, 9 Cush. (Mass.) 233; Boston *v.* Shaw, 1 Met. (Mass.) 130; Kingman, Petitioner, 153 Mass. 566; Collins *v.* Holyoke, 146 Mass. 298, 22 Am. & Eng. Corp. Cas. 333; Leominster *v.* Conant, 139 Mass. 384; Brown *v.* Fitchburg, 128 Mass. 282; Workman *v.* Worcester, 118 Mass. 168; French *v.* Lowell, 117 Mass. 363; Butler *v.* Worcester, 112 Mass. 541; Bennett *v.* New Bedford, 110 Mass. 433; Patton *v.* Springfield, 99 Mass. 627; Dorey *v.* Boston, 146 Mass. 336, 22 Am. & Eng. Corp. Cas. 353.

Michigan.—Warren *v.* Grand Haven, 30 Mich. 24; Adams *v.* Bay City, 78 Mich. 211.

Missouri.—St. Louis *v.* Oeters, 36 Mo. 456; Heman *v.* Wolff, 33 Mo. App. 200; Heman *v.* Handlan, 59 Mo. App. 490.

New Jersey.—State *v.* Jersey City, 29 N. J. L. 449; King *v.* Reed, 43 N. J. L. 186; Morris *v.* Bayonne, 53 N. J. L. 299; Hoboken Land, etc., Co. *v.* Marvin, 51 N. J. L. 285; DeWitt *v.* Elizabeth, 56 N. J. L. 119; Central New Jersey Land, etc., Co. *v.* Bayonne, 56 N. J. L. 297; Post *v.* Passaic, 56 N. J. L. 421.

New York.—People *v.* Brooklyn, 23 Barb. (N. Y.) 166; Watertown *v.* Fairbanks, 65 N. Y. 588; Roosevelt Hospital *v.* New York, 84 N. Y.

Notes

108; Matter of Merriam, 84 N. Y. 596; Matter of Kendall, 85 N. Y. 302; Matter of Metropolitan Gaslight Co., 85 N. Y. 526; Mutual L. Ins. Co. *v.* New York, 144 N. Y. 494; Mitchell *v.* Lane, 62 Hun (N. Y.) 253; Kinsella *v.* Auburn (Supreme Ct.), 7 N. Y. Supp. 317; Hanson *v.* Town (Supreme Ct.), 10 N. Y. Supp. 150; Marvin *v.* Town, 56 Hun (N. Y.) 510; J. & A. McKechnie Brewing Co. *v.* Canandaigua, 15 N. Y. App. Div. 139; McKee Land, etc., Co. *v.* Swikehard, 23 Misc. Rep. (N. Y. Supreme Ct.) 21.

Ohio.—Cincinnati *v.* Bickett, 26 Ohio St. 49; Cincinnati *v.* Connor, 55 Ohio St. 82; Toledo *v.* Lake Shore, etc., R. Co., 4 Ohio Cir. Ct. Rep. 113.

Pennsylvania.—Ward's Appeal, 3 Pittsb. (Pa.) 278; Mauch Chunk *v.* Shortz, 61 Pa. St. 399; Com. *v.* Wood, 44 Pa. St. 113; Philadelphia *v.* Tryon, 35 Pa. St. 401; Wolf *v.* Philadelphia, 105 Pa. St. 25; Lipps *v.* Philadelphia, 38 Pa. St. 503; Stroud *v.* Philadelphia, 61 Pa. St. 255; Scranton *v.* Arnt, 148 Pa. St. 210; Scranton City *v.* Barnes, 147 Pa. St. 461.

Rhode Island.—Cleveland *v.* Tripp, 13 R. I. 50; Bishop *v.* Tripp, 15 R. I. 466, 16 R. I. 198, 22 Am. & Eng. Corp. Cas. 347.

West Virginia.—Parkersburg *v.* Tavenner, 42 W. Va. 486, 26 S. E. 179.

(*a.*) *General Maintenance.*

It has been held that the costs pertaining to the management and operation of a sewer system after its construction are not properly subjects for local assessments, but rather for general taxation. McChesney *v.* Hyde Park, 151 Ill. 634; Sears *v.* Boston (Mass.), 2 Mun. Corp. Cas. 184. *Citing* Child *v.* Boston, 4 Allen (Mass.) 41; Emery *v.* Lowell, 104 Mass. 13; Erie *v.* Russell, 148 Pa. St. 384, 23 Atl. 1102; Hammett *v.* Philadelphia, 65 Pa. St. 146; *In re* Washington Ave., 69 Pa. St. 352; Appeal of Williamsport (Pa.), 41 Atl. 476; Dietz *v.* Neenah, 91 Wis. 422, 64 N. W. 299; Dyar *v.* Farmington, 70 Me. 527; Hanscom *v.* Omaha, 11 Neb. 37, 7 N. W. 739. *Contra* Denise *v.* Fairport, 32 N. Y. Supp. 97.

(*b.*) *Owner of Private Sewer May Be Assessed for Additional Sewer.*

The fact that a property-owner has already constructed a private sewer does not prevent the city from imposing upon him his proportionate share of the cost for constructing an additional sewer. St. Joseph *v.* Owen, 110 Mo 445, 42 Am. & Eng. Corp. Cas. 467; Sargent *v.* New Haven, 62 Conn. 510; Atchison *v.* Price, 45 Kan. 296, 33 Am. & Eng. Corp. Cas. 130; Philadelphia *v.* Odd Fellows Hall Ass'n, 168 Pa. St. 105.

(*c.*) *Assessments in Particular Cases.*

In Rich *v.* Chicago, 152 Ill. 18, 38 N. E. 55, it was held that an as-

Notes

sessment might be levied against non-abutting property which might be subsequently made to use the sewer. See also McKee Land, etc., Co. *v.* Swikehard, 51 N. Y. Supp. 399. Compare *In re* Park Ave. Sewer, 169 Pa. St. 433, 32 Atl. Rep. 574, where it was held that non-abutting owners having no connections could not be assessed.

The property-owner may be assessed further for a new sewer to furnish an outlet for the old one. Bayonne *v.* Morris, 61 N. J. L. 127, 38 Atl. Rep. 819. But not for draining a nuisance created by the city's neglect. Lasbury *v.* McCague (Neb.), 76 N. W. 862.

The cost of making a main sewer may not be assessed against the owner of property on a branch sewer which empties into the main sewer. Whitman *v.* Reading, 169 Pa. St. 375. *Contra*, DeWitt *v.* Elizabeth (N. J.), 27 Atl. Rep. 801; State *v.* Union, 53 N. J. L. 67; State *v.* Elizabeth (N. J.), 27 Atl. Rep. 801.

Property may be assessed for sewer connections although there are no buildings on the land assessed. Hunter's Appeal, 71 Conn. 189, 41 Atl. Rep. 557; Wright *v.* Boston, 9 Cush. (Mass.) 233; McKee Land, etc., Co. *v.* Swikehard, 23 N. Y. Misc. Rep. 21; Downer *v.* Boston, 7 Cush. (Mass.) 277; Clapp *v.* Hartford, 35 Conn. 66. See also Boston *v.* Tripp, 15 R. I. 466.

The English cases hold that the property assessed must be occupied. Tracey *v.* Taylor, 3 Q. B. 966, 43 E. C. L. 1067; Neave *v.* Weather, 3 G. & D. 221, 3 Q. B. 984, 43 E. C. L. 1067.

In Drexel *v.* Lake, 127 Ill. 54, it was held that the charter of the Town of Lake (4 P. L. Ill. 1869, p. 324), providing that the trustees may construct and maintain drains and sewers at the expense of the real estate benefited thereby, authorizes the trustees to provide by a special assessment for a system by which the sewage of a portion of the town is conducted to a central reservoir, and thence by a pump into a main drain, it appearing that the topography of the country will not permit of draining by gravitation. In such case the pumping works are part of the general system of sewage and, although the property in the district drained directly by the main sewer without the assistance of the pumping works is not benefited by such pumping works itself, yet the sewers and pumping works do not constitute distinct improvements, but the expense of both may be provided for by one assessment. *Citing* Springfield *v.* Green, 120 Ill. 269.

(4) Drains.

Local assessments may be levied upon the the property benefited for the construction of drains.

United States.—Reclamation Dist. No. 108 *v.* Hagar, 6 Sawy. (U. S.) 567; Hagar *v.* Reclamation Dist. No. 108, 111 U. S. 701.

Arkansas—Cribbs *v.* Benedict, 64 Ark. 555.

Notes

California.—People *v.* Coghill, 47 Cal. 361; Hagar *v.* Yolo County, 47 Cal. 222; People *v.* Hagar, 52 Cal. 171; Swamp Land Dist. No. 307 *v.* Glide, 112 Cal. 85; Reclamation Dist. No. 551 *v.* Runyon, 117 Cal. 164.

Illinois.—Updike *v.* Wright, 81 Ill. 49; Riebling *v.* People, 145 Ill. 120; Blake *v.* People, 109 Ill. 504; Kilgour *v.* Drainage Com'rs, 111 Ill. 342; People *v.* Clayton, 115 Ill. 150; Morrell *v.* Union Drainage Dist. No. 1, 118 Ill. 139; People *v.* Meyers, 124 Ill. 95; Russell, etc., Drainage Dist. *v.* Benson, 125 Ill. 490; Samuels *v.* Drainage Com'rs, 125 Ill. 536; Gauen *v.* Moredock, etc., Drainage Dist. No. 1, 131 Ill. 446; Wabash Eastern R. Co. *v.* East Lake Fork Special Drainage Dist., 131 Ill. 446; Hosmer *v.* Hunt Drainage Dist., 135 Ill. 51; Briggs *v.* Union Drainage Dist. No. 1, 140 Ill. 53; Badger *v.* Inlet Drainage Dist., 141 Ill. 540; Rickert *v.* Moredock, etc., Drianage Dist No. 1, (Ill.) 27 N. E. Rep. 86; People *v.* Jones, 137 Ill. 35; Sennot *v.* Moredock, etc., Drainage Dist. No. 1, 155 Ill. 96; Lovell *v.* Sny Island Levee Drainage Dist., 159 Ill. 188; Sisson *v.* Draniage Dist. No. 1, 163 Ill. 295; Robeson *v.* People, 161 Ill. 176; People *v.* Weber, 164 Ill. 412; Charleston *v.* Johnston, 170 Ill. 336.

Indiana.—Nevins, etc., Tp. Draining Co. *v.* Alkire, 36 Ind. 189; Anderson *v.* Kerns Draining Co., 14 Ind. 199; O'Reilly *v.* Kankakee Valley Draining Co., 32 Ind. 169; Jordan Ditching, etc., Assoc. *v.* Wagoner, 33 Ind. 50; Thompson *v.* Honey Creek Draining Co., 33 Ind. 268; Etchison Ditching Assoc. *v.* Busenback, 39 Ind. 362; Slusser *v.* Ransom, 39 Ind. 506; Etchison Ditching Assoc. *v.* Hillis, 40 Ind. 408; Bate *v.* Sheets, 64 Ind. 209; Deisner *v.* Simpson, 72 Ind. 435; State *v.* Thompson, 109 Ind. 533; Trimble *v.* McGee, 112 Ind. 307; Hackett *v.* State, 113 Ind. 532; Louisville, etc., R. Co. *v.* State, 122 Ind. 443; Cullen *v.* Strauz, 124 Ind. 340; McCollum *v.* Uhl, 128 Ind. 304; Pierce *v.* Aetna L. Ins. Co., 131 Ind. 284; Racer *v.* State, 131 Ind. 393; Smith *v.* State, 131 Ind. 441; State *v.* Loveless, 133 Ind. 600; Steele *v.* Empson, 142 Ind. 397; Reed *v.* Kalfsbeck, 147 Ind. 148; Hoefgen *v.* State, 17 Ind. App. 537.

Iowa.—Lambert *v.* Mills County, 58 Iowa 666; Patterson *v.* Baumer, 43 Iowa 477.

Kentucky.—Duke *v.* O'Bryan (Ky.) 39 S. W. Rep. 444.

Louisiana.—New Orleans Canal, etc., Co. *v.* New Orleans, 27 La. Ann. 505; Matter of First Draining Dist., 27 La. Ann. 20; *In re* New Orleans Draining Co., 11 La. Ann. 338.

Michigan.—Kinyon *v.* Duchene, 21 Mich. 498; Thomas *v.* Walker Tp. (Mich.), 74 N. W. Rep. 1048; Roberts *v.* Smith (Mich.), 72 N. W. Rep. 1091; Hillyer *v.* Jonesfield Tp. (Mich.), 72 N. W. Rep. 619; Jackson Fire Clay, etc., Co. *v.* Snyder, 93 Mich. 325; Conley *v.* St. Clair County, 88 Mich. 245; Laubach *v.* O'Meara, 107 Mich. 29;

Notes

Bump. *v.* Jepson, 106 Mich. 641; Cook *v.* Covert, 71 Mich. 249; Matran *v.* Tompkins, 99 Mich. 528; Post *v.* Harris, 95 Mich. 321; Pieotter *v.* Whaley, 80 Mich. 257; Wallace *v.* Sortor, 52 Mich. 159; Bench *v.* Otis, 25 Mich. 29; Atwood *v.* Zeluff, 26 Mich. 118; Mason *v.* Hazleton Tp., 82 Mich. 440; Mason *v.* New Haven Tp., 82 Mich. 435.

Missouri.—State *v.* Angert, 127 Mo. 456.

New Jersey.—Tide-water Co. *v.* Coster, 18 N. J. Eq. 518; State *v.* Blake, 35 N. J. L. 208, 36 N. J. L. 442; Craig *v.* Mackey, 48 N. J. L. 363.

New York.—Matter of Van Buren, 79 N. Y. 384; Matter of Swan, 35 Hun (N. Y.) 625; Olmstead *v.* Dennis, 77 N. Y. 378; Phillps *v.* Wickham, 1 Paige (N. Y.)590; People *v.* Haines, 49 N. Y. 587; People *v.* Jefferson, County Ct., 56 Barb. (N. Y.) 136; French *v.* Kirkland, 1 Paige (N. Y.) 117; Woodruff *v.* Fisher, 17 Barb. (N. Y.) 224; Hartwell *v.* Armstrong, 19 Barb. (N. Y.) 166.

Ohio.—Reeves *v.* Wood County, 8 Ohio St. 333; Sessions *v.* Chunkilton, 20 Ohio St. 349.

Pennsylvania.—Rutherford *v.* Maynes, 97 Pa. St. 78; Kingsessing, etc., Meadow Co. *v.* Shields, 14 Pa. Co. Ct. Rep. 647.

Wisconsin.—Muskego *v.* Drainage Com'rs, 78 Wis. 40.

But the landowner cannot be assessed for a drain necessitated by the city's creation of a nuisance on his property through the manner in which its street was constructed. Weeks *v.* Milwaukee, 10 Wis. 242. *Compare* Watkins *v.* Milwaukee, 55 Wis. 335.

(5) Levees and Dikes.

The cost of constructing levees and dikes may be assessed against the property benefited.

United States.—Boro *v.* Phillips County, 4 Dill. (U. S.) 216; Hart *v.* Levee Com'rs, 54 Fed. Rep. 559.

Arkansas.—McGehee *v.* Mathis, 21 Ark. 40.

California.—Levee Dist. *v.* Huber, 57 Cal. 41.

Illinois.—Riebling *v.* People, 145 Ill. 120.

Louisiana.—State *v.* Clinton, 26 La. Ann. 561; State *v.* Maginnis, 26 La. Ann. 558; Richardson *v.* Morgan, 16 La. Ann. 429; George *v.* Young (La.), 14 So. Rep. 137; Bishop *v.* Marks, 15 La. Ann. 147; Selby *v.* Levee Com'rs, 14 La. Ann. 437; Yeatman *v.* Crandall, 11 La. Ann. 220; Wallace *v.* Shelton, 14 La. Ann. 503; Crowley *v.* Copley, 2 La. Ann. 329.

Mississippi.—Williams *v.* Cammack, 27 Miss. 209; Alcorn *v.* Hamer, 38 Miss. 652; Daily *v.* Swope, 47 Miss. 367; Carlisle *v.* Yoder, 62 Miss. 384.

Missouri.—Egyptian Levee Co. *v.* Hardin, 27 Mo. 495.

But the power to build a drain does not authorize an assessment for

Notes

building a levee. Updike *v.* Wright, 81 Ill. 49. In Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725, it was held that the levying of special assessments for a levee on the land benefited by the construction of the levee was not referable to the police power of the state. *Contra*, Boro *v.* Phillips County, 4 Dill. (U. S.) 216.

(6) Parks and Public Squares.

Local assessments may be levied to meet the cost of parks and public squares.

United States.—Wilson *v.* Lambert, 168 U. S. 611, 18 Sup. Ct. 217; Shoemaker *v.* United States, 147 U. S. 282.

Illinois.—Farr *v.* West Chicago Park Com'rs, 167 Ill. 355, 46 N. E. 893; West Chicago Park Com'rs *v.* Sweet, 167 Ill. 326, 47 N. E. 728; People *v.* Solomon, 51 Ill. 37; People *v.* Brislin, 80 Ill. 423; Dunham *v.* People, 96 Ill. 331; Cornell *v.* People, 107 Ill. 372; Kedzie *v.* West Park Com'rs, 114 Ill. 280; Le Moyne *v.* West Park Com'rs, 116 Ill. 41.

Massachusetts.—Foster *v.* Boston Park Com'rs, 133 Mass. 321; Holt *v.* Somerville, 127 Mass. 408; Briggs *v.* Whitney, 159 Mass. 97, 34 N. E. 179.

Minnesota.—State *v.* Ramsey Co. Dist. Ct. (Minn.), 77 N. W. 968.

Missouri.—*In re* North Terrace Park (Mo.), 48 S. W. 860.

New York.—*In re* Central Park Com'rs, 63 Barb. (N. Y.) 282; *In re* Central Park Com'rs, 50 N. Y. 493; Owners of Ground *v.* Albany, 15 Wend. (N. Y.) 374.

Local assessments on land beyond a city's limits for the establishment and maintenance by the city of a park outside of its limits are unconstitutional. *In re* Prospect Park, 60 N. Y. 398; State *v.* Leffingwell, 54 Mo. 358.

The provision in an act of Congress dedicating a park to the people of the United States that the land benefited by the location of such park shall be assessed for such benefit is a taking of property without just compensation and without due process of law, and therefore unconstitutional. Craighill *v.* Van Riswick, 8 App. D. C. 185.

(7) Water Pipes.

It has been held that local assessments may be levied for the cost of laying water pipes in streets. Allen *v.* Drew, 44 Vt. 174; Hughes *v.* Momence, 163 Ill. 535; Allentown *v.* Henry, 73 Pa. St. 404. See also Philadelphia *v.* McCalmont, 6 Phila. (Pa.) 543; Northern Liberties *v.* Swain, 13 Pa. St. 113; Northern Liberties *v.* St John's Church, 13 Pa. St. 104; Ricketts *v.* Hyde Park, 85 Ill. 110.

Also for the cost of connecting with main pipes. Palmer *v.* Danville, 154 Ill. 156. Even though such mains are owned by private

Notes

corporations. Gleason *v.* Waukesha County (Wis.), 3 Mun. Corp. Cas. —, 79 N. W. Rep. 249.

But the cost of a general waterworks system is not for local assesst ment. Hughes *v.* Momence, 163 Ill. 535, 45 N. E. 300; Hewes *v.* Glos, 170 Ill. 436, 48 N. E. 922; Morgan Park *v.* Wiswall, 155 Ill. 262, 40 N. E. 611.

(8) Miscellaneous.

Local assessments have been sustained for the following improvements:

Bridges over streams and railroad tracks. Berlin Iron-Bridge Co. *v.* San Antonio (Tex.), 50 S. W. 408; State *v.* Ramsey Co. Dist. Ct., 33 Minn. 295; State *v.* Ensign (Minn.), 56 N. W. 41; Louisville, etc., R. Co. *v.* East St. Louis, 134 Ill. 656. But not for railroad bridge over street. Bloomington *v.* Chicago, etc., R. Co., 134 Ill. 451. Nor for retaining wall for subway under tracks. Toronto *v.* Canadian P. R. Co., 26 Can. S. C. 682. Nor for a bridge forming a part of the public highway within the city limits. *In re* Sawmill Run Bridge, 85 Pa. St. 163.

For the cost of closing a road. *In re* Barclay, 91 N. Y. 430. But not for the improvement of a county road. Conger *v.* Bergman (Ky.), 11 S. W. 84. Nor for graveling public grounds. Bennett *v.* Seibert (Ind. App.), 35 N. E. 35.

For the improvement of highways by land and water. Johnson *v.* Milwaukee, 40 Wis. 315, *citing* Soens *v.* Racine, 10 Wis. 271; Bond *v.* Kenosha, 17 Wis. 284; Hale *v.* Kenosha, 29 Wis. 599; Holton *v.* Milwaukee, 31 Wis. 27. And for the cost of erecting a turnpike. Goodrich *v.* Winchester, etc., Turnpike Co., 26 Ind. 119; Rykers Ridge Turnpike Co. *v.* Scott, 32 Ind. 37; Law *v.* Madison, etc., Turnpike Co., 30 Ind. 77; Center, etc., Road Co. *v.* Black, 32 Ind. 468; Lewis *v.* Laylin, 46 Ohio St. 663. But in Chicago *v.* Law (Ill.), 33 N. E. 855, it was held that the widening of a navigable river was not a matter for local assessment. Nor the paving of a public highway. *In re* Tenth St. (Pa.), 11 East Rep. 341; *In re* Washington Ave., 69 Pa. St. 352. Nor the improvement of a city market. Ft. Wayne *v.* Shoaff, 106 Ind. 66.

A local assessment may be levied for the cost of erecting a fence around a township. Shuford *v.* Lincoln Co., 86 N. Car. 552; Cain *v.* Davie Co., 86 N. Car. 8.

In Shannon *v.* Hinsdale, 180 Ill. 202, 54 N. E. 181, it was held that the question whether the renewal of a culvert was an improvement for which a local assessment might be made was for the decision of the village trustees.

In re ORKNEY ST.

v.

APPEAL OF CITY OF PHILADELPHIA.

(*Supreme Court of Pennsylvania, Jan. 29, 1900.*)

Local Assessments — Conversion of Cul-De-Sac into Thoroughfare.*—Property upon the previously opened portion of a street is not liable to a local assessment for the opening of the remainder, though two modes of access to such property will thereby be created, and only one exists.

APPEAL by city from superior court. *Affirmed.*

The opinion of the superior court reads as follows:

"Prior to these proceedings, Orkney street was laid out upon the confirmed plan of the city of Philadelphia, and, according to the plan, extended from Ontario to Westmoreland; but a portion of it, running through land of Broklehurst and Ewing, had not been opened. The result was that the properties of these exceptants were upon a *cul-de-sac*. It does not affirmatively appear that they had been assessed for the cost of the opening of the street to Broklehurst's and Ewing's land, but we are left to infer from what is stated in the opinion of the court below and at bar that the owners had dedicated the land over which that portion of the street extends. At all events, it was a paved and curbed street, and open to public travel from Ontario street to the point above mentioned, long before the adoption of the ordinance about to be referred to. An ordinance was adopted opening the street through its entire length to Westmoreland, and viewers were appointed to assess the damages of Broklehurst and Ewing. They reported that these were $4,400, and that of this sum the sum of $1,333.24 should be paid by the

*See generally Hornung *v.* McCarthy *et al.*, *ante*, 251 and exhaustive *note*, 257 *et seq.*

city, and the balance should be paid by the property owners on the previously opened portion of the street, for benefits. The question is as to the validity of these assessments for benefits.

"If this had been an open street throughout its entire length from Ontario to Westmoreland, and one end had been closed by vacation proceedings, these exceptants would have had a right in law to claim damages. Why? Because by reason of the closing of the street they would have sustained an injury in their property rights peculiar to themselves, and different in kind from the injury which would have been sustained by those who used the street for travel only. 'The injury is not of the same kind, differing in degree only. It is an additional injury, caused by the impairment of an entirely distinct right,—the special right of ingress and egress.' *In re* Melon St., 182 Pa. St. 397, 38 Atl. 482, 38 L. R. A. 275. This being so, it is argued that the converse of the proposition must be true, namely, that the conversion of the *cul-de-sac* into an open street, thus giving two modes of access to their properties where only one existed before, was, or at least may have been, a peculiar benefit, different in kind, and not merely in degree, from that accruing to properties fronting on another street, or on another block of the same street. But, before pursuing this line of argument further, it will be well to consider whether or not the liability of properties, situate as these are, to special assessments to pay the cost of public improvements, is an open one, and whether another principle does not enter into the case. In *Re* Morewood Ave., 159 Pa. St. 20, 28 Atl. 123, 132, MR. JUSTICE GREEN, after an exhaustive review of the earlier cases, including *In re* Hancock St., 18 Pa. St. 26, which is much relied on here, states the doctrine established by them in this way: 'As we have repeatedly decided, the doctrine of assessment for benefits to pay for public improvements can only be defended upon the ground that the benefits are local, and essentially peculiar to the very property assessed, and

then it can only be done once. This can only be the case when the property assessed abuts directly upon the line of the improvement. Having their own burdens to bear in this respect, the owners cannot be subjected to the discharge of similar burdens upon other properties, whether situate on the same street or in the same neighborhood.' The rule as thus stated was reiterated in *Re* Fifty-Fourth St., 165 Pa. St. 8, 30 Atl. 503,—a case of grading, paving, and curbing, where the property assessed abutted on the same street, but not on the part improved. It is to be noticed, also, that it was alleged on the argument of that case that the only outlet for the property was over part of the improvement; but this allegation was not referred to in the opinion, as it doubtless would have been if the supreme court had deemed it sufficient to distinguish the case from *In re* Morewood Ave. The order sustaining the exception to the assessment was affirmed upon the ground that, as the property did not abut directly upon the line of the improvement, it was not subject to an assessment for benefits. *In re* Morewood Ave. has been followed, and the principle upon which it was decided applied to sewer assessments, notwithstanding the argument that a public sewer is a special benefit to all the properties situate in the same watershed. *In re* Park Ave. Sewers, 169 Pa. St. 433, 32 Atl. 574; Witman *v.* City of Reading, 169 Pa. St. 375, 32 Atl. 576; *In re* Beechwood Ave. Sewer, 179 Pa. St. 490, 36 Atl. 209. We may also refer in passing to the case of Speer *v.* City of Pittsburg, 166 Pa. St. 86, 30 Atl. 1013, where it was held that the words, 'majority in interest and number of owners of property abutting on the line of the proposed improvement' (Act May 16, 1891 [P. L. 75] § 9), mean the majority on the portion of the street to be opened, and not the majority on the whole street. 'Any other construction,' said the court, 'would be contrary to the letter as well as manifest spirit of the act.' In *Re* Verona Borough, 4 Pa. Super. Ct. 608, we followed the ruling in *Re* Morewood Ave. and applied it to a case precisely like the present. It is vain to argue that *In re* Morewood Ave. can only be regarded as a binding authority

where the proceedings are under the act of 1891. It not only construes that act, but it also lays down a general rule, based upon a consideration of the nature of local assessments for public improvements, and of the limitations of the power of the legislature in that regard, which, although the act were as broad in terms as the act of April 1, 1864 (P. L. 206), would defeat any assessment of nonabutting property for paving or sewering, or other improvement of the same kind. If these cases are to be distinguished from the present, it must be on some other ground than that the act of 1864 authorizes such assessments, and that the act of 1891 does not.

"It is argued that assessments for street openings are in a different class from assessments for sewers, and for grading, paving, and curbing, and that, in laying down the rule quoted at the outset of this opinion, the supreme court has no thought of including assessments of the former class. We do not think we would be warranted in denying application of the rule to the present case upon such assumption. The ruling was made, said MR. JUSTICE GREEN, 'after much deliberation and the most mature consideration.' *In re* Fifty-Fourth St., *supra*. And, whilst it is true that all of the street-opening cases were not referred to in the opinion, yet it is also true that the leading case upon that subject was critically examined and reviewed. Speaking of that case (*In re* Hancock St., *supra*), the court said that the constitutional question whether the act was void as to lots located away from the line of the improvement was neither discussed nor decided; and, even if the case had decided that such lots could be assessed for benefits, it would have to be regarded as practically overruled by the later case of *In re* Washington Ave., 69 Pa. St. 352, in which the question was met and decided the other way. *In re* Chestnut Ave., 68 Pa. St. 81, and *In re* Main St., 137 Pa. St. 590, 20 Atl. 711, were not referred to; but, judging from the reports of those cases, the remark that the constitutional question under consideration was neither discussed nor decided would apply as well to them as to the Hancock St. Case.

In re Orkney St. *v.* Appeal of City of Philadelphia

"It may be said that the constitutional question did not necessarily arise in the Morewood Ave. Case. Possibly not. But it was raised by counsel, and, after a thorough consideration of it, the court decided it. When liability of nonabutting property to assessment is defended against upon constitutional as well as statutory grounds, and both grounds of defense are held to be good by the court of last resort, and either of those questions arises in a later case, will any other state court be justified in holding that the precedent is not of binding authority in that case, because, forsooth, the decision might have been based on the other ground exclusively? We think it more in accordance with sound principle to say that the general rule upon the subject laid down by the supreme court in such a case ought to be followed by all the other courts of the state until it is modified or qualified, unless it can be shown that the particular case for decision differs in essential facts, is clearly not within the reason of the rule, and therefore presumably was not intended to be embraced within the rule itself. Is this such a case? Granting for the sake of the argument, that it is not within the reason of the first branch of the rule, what is to be said of the application of the second branch? It may well be that the properties of the exceptants are enhanced in value by the opening of the street through to Westmoreland street; and, in view of the decision in the Melon St. Case, it would seem inconsistent to declare, as a matter of law, that the additional mode of ingress and egress that is to be given is in no sense a special benefit. But there remains the objection that, by dedication or otherwise, these properties were made to bear their full share of the cost of the original improvement. Can they be assessed again to pay the cost of extending that improvement through other properties? Can a street be opened piece-meal, and the properties abutting on the part first opened be assessed for benefits to pay the cost of extending the improvement the second or third time? The repaving of a street is, in a sense, a special benefit to the properties abutting on it, but it is settled beyond all controversy that

it cannot be done at their expense. Hammett *v.* city of Philadelphia, 65 Pa. St. 146; City of Williamsport *v.* Beck, 128 Pa. St. 147, 18 Atl. 329. The same is true of the extension of a pavement. What is the distinction? We are unable to answer these questions in accordance with the appellant's contention, and at the same time reconcile the decision with the rule laid down in *Re* Morewood Ave., and followed by us in *Re* Verona Borough. If that rule is to be modified, we do not think it will be done upon the ground that an assessment according to benefits in a grading and paving case is so different in essential particulars from a similar assessment in a street-opening case that in the former case a property abutting on the street can be assessed but once for the improvement, whilst in the latter case it may be assessed and reassessed as often as the street is extended. It seems to us that the rule is a general one, and ordinarily is as applicable in one case as in the other. Whilst the decision in the Melon St. Case does suggest a possible distinction, yet it does not distinguish the two classes of cases in every particular. If for this or any other reason the rule is to be modified, and exceptions recognized, our duty to wait until it is done by the supreme court is plain. An opposite course, even if we were disposed to adopt it, would simply lead to confusion. We conclude, therefore, that the learned judge of the court below was right in holding that the cases above cited were of binding authority, and were applicable to the present case, notwithstanding the fact that the proceedings were under the act of 1864, and not the act of 1891. This conclusion renders it unnecessary to express any opinion upon the question as to the authority of the jury to go on with the proceedings after the next term succeeding their appointment, without a formal continuance of the order made during that term. Order affirmed."

Norris S. Barratt, James Alcorn, Asst. City Sol., and *John L. Kinsey, City Sol.*, for appellant.

H. B. Gill and *Charles Knittel*, for appellee.

PER CURIAM. We quite agree with the court of quarter sessions and the superior court in their disposition of this case. The opinion of the court is so thorough and exhaustive, and so entirely correct, that we can add nothing to it. We affirm the order of the court below upon the opinion of the superior court.

BELL

v.

VILLAGE OF WAYNE.

(*Supreme Court of Michigan, March 27, 1900.*)

Personal Injuries—Unmanageable Horse—Absence of Barriers—Liability of Municipality.*—A horse became so frightened at something for which the municipality was not responsible that, after it had backed the vehicle to one side of the highway, his driver could not by proper management prevent it from crossing the roadbed, which was 17 feet wide and in good condition, and going down an unguarded embankment on the other side; and the driver was injured by the fall. *Held*, that the municipality was not liable, as the horse was beyond control, and the fright, and not the absence of barriers, was the cause of the accident.

ERROR by plaintiff to Wayne county circuit court. *Affirmed.*

Selling & Hatch, for appellant.
Cutcheon & Stellwagen, for appellee.

GRANT, C. J. The distinction, now contended for in cases of this character, was not lost sight of by the writer of the opinion in Doak *v.* Saginaw Tp. (Mich.) 78 N. W. 883. The differences between that case and this are these: In this case the banks were higher and steeper, at least on one side. In the Doak Case the frightened horse backed into the ditch. In the present case the

*See Hungerman *v.* City of Wheeling, *ante* 92, and extensive *note*, 101 *et seq.*

backing horse was struck by the plaintiff, started forward, crossed the road, and went down the embankment. The roadbed in this case was wider than that. Here the roadbed was 17 feet wide, and in good condition. In both cases the horses were frightened, and not by anything for which the township was at fault. In the Doak Case it was uncertain what frightened the horse and caused him to back. In the present case it was two boys in a tree. The plaintiff lost control of his horse, so that he was unable to keep him within the traveled way, 17 feet wide. He testified that there would have been no trouble if the horse had not seen the boys in the tree. Whether this is a case where barriers should have been erected I do not deem it necessary to determine. In Massachusetts the statute expressly makes townships liable for the failure to erect barriers. What the decisions would be if their statute were like ours is, at least, doubtful. In Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166, the stone wall which formed the barrier was 2 feet high. On the outside of the wall was water 10 feet deep, the surface of which was about 8 feet below the top of the wall. The horse became frightened at some oyster boats, and ran into or upon the wall, and got astride of it with his hind legs. That case is in direct conflict with Beall *v.* Athens Tp., 81 Mich. 536, 45 N. W. 1014. It is impossible to reconcile them. In Harris *v.* Inhabitants of Great Barrington, 169 Mass. 271, 47 N. E. 881, it was held that the roadbed, 17 feet wide, was not defective by reason of narrowness, but that there was evidence that the highway was defective for want of a sufficient railing. If, as my BROTHER MONTGOMERY says, the rule has not been made entirely clear by the decisions, it undoubtedly results from the difficulty in determining when the driver has, and when he has not, lost control of his frightened horse. In the Doak Case the horse had become so unmanageable that the driver could not prevent his backing. Doak's counsel said in their brief: "The driver did his utmost to prevent the backing." In the present case the frightened horse was backing, was struck by the

driver, and had become so unmanageable that he could not keep him within the limits of the traveled road, wide enough for two teams to pass with perfect safety. Plaintiff did his utmost to keep the horse in the road, but failed to do so. We held in St. Clair Mineral Springs Co. *v.* City of St. Clair, 96 Mich. 463, 56 N. W. 18, that where a horse stopped, backed over the apron of a bridge against an insufficient railing, fell into the water, and was drowned, the township was not liable. In that case there was no fright. The horse started up the bank, and backed because of too great a load. Under the contention of the plaintiff in this case, if the horse, instead of backing from an overload, had backed from fright, and the jury could find that the driver had lost only temporary control the township would have been liable. In neither case was the township responsible for the proximate cause of the accident. What diffence, in principle, detween the two cases? Is it logical to say that, where the horse backs from other cause than fright, the township is not liable, but where he backs from fright it is liable, provided the jury are able to find that the driver had not lost complete control of him? There certainly is no difference in the liability between backing and shying or running down an embankment or into a ditch. In Beall *v.* Athens Tp., the horse became frightened at a log upon the side of the highway. The driver struck his horse, which jumped forward, and upset the buggy. In this case the horse became frightened, was struck, could not be kept within he highway, and went down the embankment. Where is the difference in principle or in the facts between that case and the present? Both horses went over the side of the road because their drivers were unable to keep them within the traveled way. In Lambeck *v.* Railroad Co., 106 Mich. 512, 64 N. W. 479, plaintiff's horse had run for a block, and ran into the end of a car standing in the highway. Plaintiff was unable to keep him from running the carriage against it. It was held that the horse was beyond control. In Agnew *v.* Corunna, 55 Mich. 428, 21 N. W. 873, it was claimed that the horse was

frightened at a large stone standing in the highway between the roadbed and the gutter, turned up a side street, and upset the buggy. It was there said: "If the stone had anything to do with the action of the horse and damage to the buggy, it was by frightening the animal, and not by hurting or impeding him." If the horse in that case had shied or run into the gutter, or, running down the side of the roadbed, had caused the buggy to sway and upset, would not the rule of law have been the same? In Bleil *v.* Railway Co., 98 Mich. 229, 57 N. W. 117, the horse was hitched, broke away, and ran into iron rails piled upon the street. If the driver had been in the buggy when the window fell, and the horse had started and run upon the rails, causing the same injury, would this court have said that the rails, and not the falling of the window, were the proximate cause of the injury, if the jury were enabled to find that the horse was not beyond control? What is the principle or rule upon which these decisions are based? It is that the primary cause of the accident is the fright of the horse, not the defect in the highway. Why should a jury be left to speculate upon the question whether the driver could have controlled his horse but for the defect in the highway? In Langworthy *v.* Green Tp., 95 Mich. 93, 54 N. W. 697, the wagon struck a log, which was from 4 to 18 inches above the roadbed, and near the center thereof. The horse had not left the traveled road, but had, for some reason which did not appear, shied a little to one side. It did not appear that the horse was running, or was going at an unsafe speed for a properly constructed roadbed. By referring to the same case in 88 Mich. 207, 50 N. W. 130, it will be seen that the plaintiff was driving at a slow trot when the log was struck.

We are not concerned with the rule in other courts, if this court has established a rule and followed it. In the cases above cited I think we have established and recognized the rule to be that a township is not liable, under our statute, for the failure to maintain barriers, where the horse leaves a traveled highway, which is in good condition and wide enough to

drive upon with safety, through any cause for which the township is not responsible. When a horse has become so frightened that, under proper management, he cannot be kept within a good roadbed 17 feet wide, he is beyond control, under our decisions, and the fright, not the absence of barriers, is the cause of the accident. Upon no other rule can these decisions, in my opinion, be sustained.

I think the learned circuit judge was correct in directing a verdict for the defendant. Its reversal would, in my judgment, result in overruling the cases above cited, and approved in Doak *v.* Saginaw Tp. The judgment should be affirmed.

LONG, J., concurred.

HOOKER, J. (concurring). The doctrine that a township is not liable for an injury, where, though negligent, such negligence is not the proximate cause of the injury, has been asserted and reiterated many times by this court. Like other rules, it is invoked in many cases where its application is of doubtful propriety, and doubtless in some to which it should not be applied. It is not unnatural that minds should differ in close cases, and there is always danger that a misapplication shall make it more difficult to adhere to the rule, and easy to extend it. There is but one proper way to deal with such questions, and that is to adhere to the underlying principle, and not put too great emphasis upon similar, but not necessarily analagous, decisions. If this is done in this case, I am of the opinion that its proper solution need not be difficult. It has been several times held that where a horse, while running away, strikes an obstruction, the resulting injury is due to the running away, and not to the obstruction, because the former, and not the latter, is the proximate or moving cause of the injury. The law requires highways to be kept in condition for the ordinance uses, and it expects the driver to be in control of his horse, and does not assume to compensate those who are injured through a failure to maintain such control. The decisions do not refuse relief upon the grouud that the horse was running away, but upon the ground that

the uncontrolled impulse of the horse was the moving, *i. e.* proximate, cause. Where the loss of control is due to the negligence of the town, it has been held that the township is liable, but where it is due to other causes the contrary has been usually held. We are cited to cases which hold that the mere shying of a horse is not sufficient to exonerate a township, the reason being given that shying is to be expected of a horse, and that control cannot be said to be lost if the horse is so far under the control of the driver as to be immediately stopped or brought back to the traveled way. It makes little difference whether we say that the horse was under control of the driver when he shied, or that the want of control was but momentary, and to be expected at times with any horse, from his common and known habit, and therefore an exception to the rule. In neither is ground for breaking down the rule. The case can, at most, be treated as an exception, and, though a precedent governing cases where a horse shies suddenly a little out of the beaten track, it does not follow that the exception should cover all cases, where the want of control is of short duration, or where caused from some vice or habit which cannot be said to be found in horses in general. A horse which, through fright at an object on one side of the road, leaves the traveled way, and, notwithstanding the utmost efforts of the driver, cannot be made to return to it, and ultimately crosses the highway ditch, or goes to the verge of an embankment, which slides down with him, has done something more than to merely shy. To "shy" is defined as "to start suddenly aside as if a little frightened " So, if the horse should rear, and fall against the carriage, throwing all down an embankment, or if he should refuse to obey the driver to go forward, and back up instead, overturning the buggy against a tree in the highway, or going down an embankment, the horse is beyond control, as much as though running away, and, to my mind, much more than when merely or momentarily starting and shying. If these instances are enlargements of the adjudicated instances of shying, they are not within the exception, and, if one after

another they are included within the exception, the rule will soon give way under the evolution of the exception. It is as much the duty of the citizen to drive reasonably tractable horses as it is of the community to maintain reasonably safe highways, and as much the duty of courts to hold the former to the consequences of a failure of the performance of his duty as the latter, and it is, to say the least, fairly debatable whether the doctrine of proximate cause is not a reasonable and just one. It is not yet the law that the highways must be so level and smooth that a horse cannot capsize a carriage, and provided with barriers so strong that a team cannot break them down, to the injury of the driver. Barriers may be required in some cases, as where the highway and its surroundings are of such a character as of themselves to create the danger of fright, but we may take judicial notice that barriers are usually limited to such places, and are not common along our highway ditches or causeways. The Case of Doak was correctly decided, in my opinion. The present case is substantially on all fours with Beall *v.* Athens Tp. The other cases are not cited, because referred to in the opinions of my Brethren. I think the judgment should be affirmed.

MONTGOMERY, J. (dissenting). This is an action for personal injuries claimed by the plaintiff to have been caused by the negligence of the defendant. The injuries were sustained by the plaintiff, May 17, 1892, upon a highway within the corporation limits of defendant. The highway in question crosses the River Rouge a few rods north of the place where plaintiff was injured, and the approach to the bridge crossing the river is elevated at the point where the accident happened 8 feet 10 inches on the west side, the descent being absolutely perpendicular, and 8 feet 6 inches on the east side, the descent being a slope above the surrounding country. The approach to the bridge is the same width as the bridge where they join, but a few yards north of the bridge, and at the point where the plaintiff was injured, it is but 17 feet in width. There was no barrier on either side of the approach to prevent travelers from going off the road down

the embankment on either side. There was a plum tree a little west of the roadbed, at a point where the approach to the bridge ended, and a few rods south of the place of the accident, towards the main part of the village. Upon the morning in question, Andrew Bell, the plaintiff, was driving along the said road towards the main part of the village, on his way to the home of his sister-in-law, Susan Bell, who lived on the other side of the village. He was driving his horse, which he described as gentle, and not given to shying, attached to his buckboard. He had crossed the bridge, and was upon the southern approach to the same, at a point nearly abreast of the piling, when the horse caught sight of some boys in the plum tree picking blossoms, and thereupon started to back. The buckboard wheels were cramped, so that, if the horse continued to back, Bell would have been thrown out backwards, down the abrupt descent upon the west side, there being no barrier to arrest the progress of the vehicle. To save himself from this danger, he struck the horse one blow with the whip, and in obedience to the blow the horse started forward at a slow pace (about half as fast as a man can walk). The loosely-packed earth on the east side of the approach gave way, the horse slipped down the east side of the approach, and plaintiff was thrown out, and sustained the injuries complained of. The evidence shows that the horse was not running away; that, at the most, he took but three or four steps back, and that plaintiff did not lose control of the horse; and that the horse had his own way but momentarily, at the most.

The foregoing is the statement of facts, taken in the main from plaintiff's brief, and we find that there is testimony tending to support the statement in every particular. As the circuit judge directed a verdict for the defendant, the inquiry is whether, assuming this state of facts, the plaintiff was entitled, under any theory, to take the judgment of the jury as to the question of defendant's liability. The learned circuit judge, while stating that he was unable to reconcile all that this court has said in various cases, regarded it

as *stare decisis* that the presence of those boys in the plum tree and the consequent fright of the horse was the proximate cause of the injury to plaintiff, and directed a verdict for defendant. We think it must be conceded that this court has not made the rule in this class of cases entirely clear. It is equally true that other courts, in dealing with the broad question of proximate cause, as well as in dealing with the more restricted one as to what is to be deemed an intervening cause, such as relieves a municipality from responsibility from defective highways, have encountered difficulties at every turn, and have not always dealt with the question logically. See this illustrated in cases commented on by JUDGE COOLEY (Cooley, Torts, pp. 76, 77, and also at page 622 *et seq.*). At page 70, JUDGE COOLEY states one of the rules relating to the subject as follows: "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes, which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which are innocent. But, if the original wrong only becomes injurious in consequece of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause." In a very able discussion of the causal connection by Mr. Wharton, at section 103 of his work on Negligence, he reaches the conclusion that where a township is negligent in failing to keep its highway in repair, and an injury results from a frightened horse striking against a defect in the way from which, if he had not been frightened, he could have been safely guided by his driver, the municipality is not liable to an action, for reasons fully stated by him. He adds, however: "This mode of reasoning is inapplicable if the evidence is that the horse, being driven with due care, simply shies to an extent common and probable among horses, and when shying he deflects a few feet from the beaten track, and then strikes against the defect. In such case, as such shying is part of

the natural and probable habits of horses, and does not when only producing a slight change of course make the horse unfit for use in a public road, the road-making authorities are liable for the consequences." See, also, Whart. Neg. § 983. There are many cases which, as pointed out in Langworthy *v.* Green Tp., 95 Mich. 93, 54 N. W. 697, held to a still stricter rule of liability, and maintain that the fact that the horse is frightened, and at the time uncontrollable, does not relieve the municipality of liability. We think the better rule is that quoted from the text of Wharton on Negligence, and this rule we find abundantly supported in those jurisdictions in which the stricter rule, above adverted to, does not prevail. The case of Wright *v.* Inhabitants of Templeton, 132 Mass. 49, is very similar in its facts to the present. The plaintiff's horse was frightened by the lantern of some boys fishing. The horse backed up, cramped the wagon, and carried it against the railing, which gave way. Defendants preferred a request that, if the horse backed a distance of 20 or 30 feet, the plaintiff could not recover. The court held that this request was properly refused. It was held, in effect, in Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166, that the township might be liable if the driver did not lose control of the horse, or lost control for a moment only, and either regained control, or would have regained it but for a defect in the way. See, also, Harris *v.* Inhabitants of Great Barrington, 169 Mass. 271, 47 N. E. 881. The case of Olson *v.* City of Chippewa Falls, 71 Wis. 558, 37 N. W. 575, is quite similar in its facts to the present. It was said: "The team instantly and suddenly became frightened by some suddenly appearing object, and instantly and suddenly backed. Such a movement in any team would not be at all uncommon under such circumstances, and so the city might have anticipated when it left the steep bank of the creek so unguarded at such a place." The distinction contended for in the present case was again noted by this court in Gage *v.* Railroad Co., 105 Mich. 335, 63 N. W. 318, and recognized in Simons *v.* Cisco Tp., 105 Mich. 588, 63 N. W. 500, but

was clearly lost sight of in Doak *v.* Saginaw Tp. (Mich.) 78 N. W. 883. In the last case a motion for a rehearing should be granted. We think the plaintiff was entitled to go to the jury. It is contended in this court that the highway at this point was a part of the bridge. It does not appear that the point was made on the trial, and, as the facts are not as fully developed as they may be on another trial, we do not discuss it. The judgment should be reversed, and a new trial ordered.

MOORE, J., concurred.

PEOPLE *ex rel.* KOCHERSPERGER

v.

COOK.

(*Supreme Court of Illinois, June 17, 1899.*)

Abutting Property—Power to Subdivide for Improvement Assessments.*—A municipality cannot dictate to the owner of property fronting upon a street how he shall subdivide it; and an ordinance which arbitrarily subdivides such property for the purpose of assessing it for public improvements is void.

APPEAL by relator from Cook county court. *Affirmed.*

This is an application, made at the July term, 1898, of the county court of Cook county, for judgment and order of sale by the county collector of that county against lands delinquent for the nonpayment of taxes and special assessments. The appellee appeared, and filed objections to the entering of judgment and to the ordering of sale against his property, which objections were sustained, and the judgment and order of sale were refused by the county court. The present appeal is prosecuted to reverse such judgment. The judgement and order of sale are asked for, in order to make

*See generally extensive *note*, *ante* 257 *et seq.*

the amount of a certain judgment of confirmation, entered, in a certain assessment proceeding, in April, 1897, against the property of appellee. The petition for the levy of the assessment against the property was filed in the county court on January 16, 1897. Section 2 of the ordinance, lying at the basis of the assessment proceeding, is as follows: "That a drain of six inches internal diameter of the best quality of virtrified tile pipe of the city of Chicago standard pattern be, and is hereby ordered, laid from each of the lots and parcels of land hereinafter described, abutting on Colorado avenue, from South Fortieth avenue to South Forty-Eighth avenue, in said city, to connect with a public main sewer in Colorado avenue, in front of or adjoining such lot or parcel of land." The ordinance then describes 44 separate parcels of ground, in each of which a drain is to be laid connecting with the main sewer.

Charles S. Thornton, Corp. Counsel, and *John A. May*, for appellant.

William J. Donlin and *Charles T. Mason*, for appellee.

MAGRUDER, J. (after stating the facts). In the present case, the property specially assessed was a tract of land which was unsubdivided. The ordinance attempts to subdivide this tract of land, thus legally unsubdivided, into parcels, for the purpose of placing in each parcel a drain. The attempt is made to arbitrarily subdivide the property into parcels of land, each about 25 feet in width, for the purpose of the assessment, and for no other purpose. Property must be specially assessed under its known legal description. An ordinance which arbitrarily subdivides property for the purpose of assessing the same is illegal and void. The owner of property cannot be compelled to subdivide his land into 25-feet strips fronting upon a street. The owner has a right to subdivide his land in such a way as he sees fit. He may use his own pleasure and best judgment in subdividing it, so that it will produce to him the

best revenue. A municipality cannot dictate to the owner how he shall subdivide his land. An ordinance, which thus attempts to place drains into unsubdivided property at each 25 feet of ground, is without warrant in the law.

In Warren *v.* City of Chicago, 118 Ill. 329, 11 N. E. 218, where there were certain vacant lots, having a frontage of 45 feet abutting upon a street, in which lateral service pipes were proposed to be laid, in order to connect the water main with adjacent property, and where the city authorities, for the purpose of assessment for the improvement, made an equal subdivision of these lots, proposing to lay a service pipe to each half lot, and a special assessment was levied upon the property accordingly,—that is, for one service pipe upon each half lot, being for two service pipes upon each whole lot,—we said (page 333, 118 Ill., and page 219, 11 N. E.): "Conceding the power to make the assessment, we are clearly of opinion that the scheme adopted, so far as appellant's property is concerned, was unauthorized and void. * * * The only shadow of justification which is shown for this discrimination against appellant is the arbitrary subdivision made of his lots for the purposes of the assessment, which was done without any authority, either in law or fact. There is no pretense it was done with the sanction of appellant, or that the property was ever theretofore known or designated, as it is described in the assessment proceeding." Section 2 of the ordinance in the case at bar is almost exactly the same as section 1 of an ordinance for water-service pipes, set forth in Cram *v.* City of Chicago, 139 Ill. 265, 28 N. E. 758; and the ordinance in Cram *v.* City of Chicago, *supra*, was held to be invalid. In the latter case, the property assessed consisted of certain unsubdivided blocks, which had not been platted or divided by the owners into lots, but the city, in making the assessment, undertook to make a division. There was a series of descriptions contained in the ordinance for drain pipes, subdividing the property into strips of 25 and 100 feet deep, each

as therein shown. Each of these strips was assessed a certain sum. We there held that, in an ordinance of this kind, there cannot be a merely arbitrary description, but the description must be of the lot or tract of land as it is legally known and designated. We there said (page 268, 139 Ill., and page 758, 28 N. E.): "An arbitrary description, or one having no foundation in fact, could never have been contemplated. The property fronting on Root street was divided into blocks, and, in making the assessment, the city had no authority to subdivide these blocks into strips of twenty-five feet, and make the assessment on the property according to that description; but, on the other hand, if the city desired to assess the property, it should have proceeded against the property as it was known and legally described. The question is not a new one in this court. The same question arose in Warren *v.* City of Chicago, 118 Ill. 329, 11 N. E. 219, and a similar assessment was condemned." See, also, People *v.* Clifford, 166 Ill. 165, 46 N. E. 770.

As the ordinance in this case is of the same character as the ordinance which we condemned in Warren *v.* City of Chicago, *supra*, and in Cram *v.* City of Chicago, *supra*, we must hold that the court below committed no error in sustaining the objection, made by the appellee, that the ordinance, upon which the assessment is based, made a purely arbitrary subdivision of his property. Accordingly the judgment of the county court, sustaining the objection of the appellee and refusing judgment and order of sale, is affirmed. Judgment affirmed.

MAYOR, ETC., OF CITY OF CHATTANOOGA

v.

REID.

(*Supreme Court of Tennessee, Nov. 22, 1899.*)

Injury to Property—Failure to Build Sewer or to Abate Nuisance—Liability of City.*—The nuisance complained of consisted of a pond of foul water and garbage in a public alley, upon which plaintiff's property abutted, and was created, and was being kept up by the daily discharges into the alley from a sewer on private premises, over which the city had no control. And such accumulation of sewage could only have been prevented by building a sewer to carry it off, or by compelling the occupants of the premises to stop turning the sewage into the alley. *Held*, that the city was not liable for failing to remove or abate the nuisance, in an action for injury to the abutting property resulting from the foul odors and gases from such pond, although it had authority to abate such nuisances.

APPEAL by defendant from Hamilton county circuit court. *Reversed.*

Oscar T. Peeples, for appellant.
Cooke, Swaney & Cooke, for appellee.

SHIELDS, Special Judge. This suit was brought by Eugene Reid before a justice of the peace of Hamilton county against the mayor and aldermen of the city of Chattanooga, to recover $499 damages "for injury to property at No. 21 Grove Street alley, resulting from an open sewer." The facts upon which the plaintiff relies to maintain this action are as follows: The plaintiff, Reid, owns a house and lot on Grove Street alley, in the city of Chattanooga, which alley is a public thoroughfare, and is under the control of the defendant. One S. B. Strang owns a lot directly across the alley from the plaintiff's property, and abutting on the alley. Strang

*See note at end of case.

erected two houses on his said lot, and constructed a sewer from the rear of these houses to the line of his lot on the alley. These houses were occupied by tenants of Strang, and this sewer was used by them to carry off the water from the hydrants and kitchen sinks of these houses, and the kitchen refuse was constantly poured into this sewer, and was discharged from the property of Strang into Grove Street alley, directly in front of the plaintiff's property. This water and refuse accumulated in a pond about 18 inches deep in front of plaintiff's property, and at times in the summer season the odors and gases from this pond were very offensive, and consequently very annoying to the plaintiff's family. This condition of affairs continued for about three years, and after plaintiff had repeatedly notified the city authorities, and requested them to abate the nuisance. In the summer and fall of 1897 the plaintiff was compelled to remove from his residence on said property, and to remain away from it for four months, during which time he could not get a renter to occupy the property, because, as is clearly proven in the record, of the offensive odors and gases that arose from this pond. The justice of the peace rendered a judgment in favor of the plaintiff for $100, and the defendant appealed to the circuit court. The case was tried in the circuit court before a jury, and resulted in a verdict of $300 in favor of the plaintiff, but, a *remittitur* of $50 having been entered, a judgment was rendered against the defendant for $250. The defendant has appealed to this court, and assigned errors.

The first assignment of error is that there is no evidence to support the verdict. The evidence is conclusive that the accumulation of garbage and greasy waters in Grove Street alley, which came into the alley through a sewer on the private property of Strang, created a public nuisance, under subsection 1 of section 6869 of Shannon's Code, which declares it to be a public nuisance "to cause or suffer any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others." If, therefore, a municipal corporation is answerable in damages to an indi-

vidual citizen for injuries to abutting property resulting from its failure to abate or prevent the continuance of this nuisance, the plaintiff is entitled to recover some damages in this case. Upon these questions the trial judge charged the jury as follows: "The city of Chattanooga, by its charter, has the power to make regulations to secure the general health of the inhabitants, and to prevent and prohibit nuisances; and the court instructs you that, if the proof shows that there was a nuisance in the street in front of the plaintiff's premises, it was the duty of the defendant city, under the powers conferred upon it by its charter, to remove and abate it, and a failure to do so would subject the defendant city to a criminal prosecution by indictment, and would also subject it to pay such damages as accrued to any individual by reason of its failure to perform the duties devolved upon it." The defendant insists that the latter part of this charge is erroneous, and resulted in an unjust verdict and judgment against it. The criticism of the charge is that, when applied to the facts of this case, it erroneously instructs the jury, in effect, that the city is liable in damages for a failure to build a sewer to carry off the garbage that is discharged into Grove Street alley by this sewer on private property, or for its failure to prosecute Strang and his tenants for creating and keeping up the nuisance complained of. It is earnestly insisted that there is no civil liability on the part of the defendant to a private citizen for its failure to perform these public duties.

It may be conceded, as is insisted by the plaintiff's attorney, that municipal corporations are liable in civil actions for injuries to persons or their property when lawfully on or passing over their streets, when the injury is occasioned by the corporation's negligence in failing to keep the streets in good repair and free from obstructions, as was held in the cases of Mayor, etc., *v.* Lasser, 9 Humph. 757; Mayor, etc., *v.* Brown, 9 Heisk. 1; Niblett *v.* Mayor, etc., 12 Heisk. 684; Mayor, etc., *v.* Bell, 13 Lea, 158. It may also be conceded, as is further insisted, that, where a municipal corporation has the power to remove or abate a nuisance which is injurious to

the health of its citizens, it is answerable to the public at large, and may be indicted for permitting the nuisance within the corporate limits, or for failing to abate such a nuisance, as was held in the cases of State *v.* Corporation of Shelbyville, 4 Sneed, 177; State *v.* Barksdale, 5 Humph. 154; State *v.* Mayor, etc., of Memphis, 11 Humph. 30. It may also be conceded that, when a municipal corporation has constructed sewers, it is in duty bound to keep them in good repair and free from obstructions, and will be liable to a private citizen for any damage directly resulting from its failure to do so, as was held in the case of Horton *v.* Mayor, etc., 4 Lea, 48. It is quite clear, however, that these principles are not controlling in the case under consideration. The nuisance complained of in this case, as has already been stated, was created and was being kept up by the daily and constant discharge into Grove Street alley of garbage and sewage through this sewer, on private property, and over which the city had no control. The accumulation of foul water and garbage, in so far as this record discloses, could only have been prevented by building a sewer to carry it off, or by taking appropriate measures to stop Strang and his tenants from turning it into the alley. It is a well-settled principle of law that a municipal corporation is not bound to build sewers, and that it is not responsible to a private citizen for failing to provide sewers for any part of its territory. The building of a public sewer by a municipal corporation is the exercise of a legislative discretion, and it is not responsible in a private action for its failure to exercise this discretion. Horton *v.* Mayor, etc., 4 Lea, 47; Mills *v.* City of Brooklyn, 32 N. Y. 495; Dill. Mun. Corp. (4th Ed.) § 1046. It is equally as clear that the duty of the city to prevent Strang and his tenants from continuing to drain this foul water and garbage into the street, by prosecution or other appropriate remedy, in order to prevent a continuance of this nuisance and to preserve the public health of the city, was a part of the general governmental or public duties of the corporation, and was a duty that it owed to the public at large, and not to individuals. The creation of this nuisance

by Strang and his tenants is made a misdemeanor by the general laws of the state (Shannon's Code, § 6869); and, while the power to abate nuisances is given the city by its charter, the duty to do so grows out of the power delegated to it to administer and enforce this general law of the state, and is essentially a public, and not a local and special, duty; and in its execution the city is deemed to be the agent of the sovereign power of the state, and is not subject to be sued by private persons for the torts of its agents in the exercise of these powers, or for their negligence in failing to execute them. Davis *v.* Knoxville, 90 Tenn. 601–603, 18 S. W. 254; McCrowell *v.* Mayor, etc., 5 Lea, 688, 689; Dill. Mun. Corp. (4th Ed.) §§ 951, 952; Connelly *v.* City of Nashville, 100 Tenn. 265, 266, 46 S. W. 565. JUDGE DILLON, in his standard work on Municipal Corporations, speaking of their liability to private citizens for failing to perform their public duties, says: "A failure by the corporation to exercise its charter power to abate nuisances not rendering its streets unsafe does not give a person who is injured by such failure a private action against the corporation; and therefore where a house in a city was destroyed by fire caused by sparks from an engine on the adjoining property, which was by ordinance a nuisance that the city might have abated, but which, after notice and request, it had neglected to abate, the city is not liable in damages for such nonaction and neglect, to the owner of the house destroyed. Nor is the city liable to the plaintiff for the value of his house, destroyed by the taking fire of a wooden building which the city permitted to be erected in violation of its ordinances. It has sometimes, indeed, been broadly declared that, in the absence of a statute giving it, an action at law for damages will not lie against a municipal corporation for failing to exercise its legislative functions or powers, to the injury of private individuals, even where the duty of exercising them is imperative or mandatory." Dill. Mun. Corp. (4th Ed.) §§ 951, 952. The rule governing cases like this is laid down in Sherman & Redfield on Negligence, in the

Note

following language: "Except in Maryland, and perhaps Pennsylvania, it is everywhere held that a public duty to make and enforce adequate laws for the prevention or abatement of nuisances injurious to the health, property, or person of the citizen is an imperfect obligation, and cannot be enforced against the will of the state. The mere fact that a nuisance exists and has occasioned an injury to a third person does not render the corporation liable therefor, provided the nuisance was not created or maintained by the corporation itself. Such failure to execute the law is neglect of a duty owing to the public, not to individuals." Shear. & R. Neg. (5th Ed.) pp. 487–489, § 262. The right to proceed by criminal prosecution in the courts of the state, or by other appropriate remedy, against Strang and his tenants, for creating and continuing this nuisance, was open to the plaintiff. For such unlawful conduct, resulting in special injury to the plaintiff, he must proceed by criminal prosecution, or look to Strang and his tenants for such civil remedy as the law will give him. It follows, therefore, that the charge of the circuit judge was erroneous, and the case will be reversed and remanded for a new trial.

NOTE.

Liability of Municipal Corporation for Failure to Construct Drains or Sewers.—A municipal corporation is not liable in an action for damages for its failure to exercise its power to construct drains and sewers. Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562; Denver *v.* Capelli, 4 Colo. 25; Springer *v.* Walters, 37 Ill. App. 326; Elkhart *v.* Wickwire, 121 Ind. 331; Atchison *v.* Challiss, 9 Kan. 603; Child *v.* Boston, 4 Allen (Mass.), 41; McClure *v.* City of Red Wing, 28 Minn. 194; St. Paul, etc., R. Co. *v.* Duluth, 56 Minn. 494, 45 Am. St. Rep. 491; Rowe *v.* Portsmouth, 56 N. H. 291, 22 Am. Rep. 468; Barton *v.* City of Syracuse, 37 Barb. 295; Wilson *v.* New York, 1 Den. (N. Y.) 595, 43 Am. Dec. 719; Seifert *v.* Brooklyn, 101 N. Y. 136; Mills *v.* Brooklyn, 32 N. Y. 489, 5 Am. Law Reg., N. S., 33; Springfield *v.* Spence, 39 Ohio St. 665, 2 Am. & Eng. Corp. Cas. 620; Philadelphia *v.* Odd Fellows' Hall Assoc., 168 Pa. St. 105; Oil City *v.* Oil City Boiler Works, 152 Pa. St. 348; Carr. *v.* Northern Liberties, 35 Pa. St.

324, 78 Am. Dec. 342; Fisher *v.* Harrisburg, 2 Grant's Cas. (Pa.) 291; Horton *v.* Nashville, 4 Lea (Tenn.) 39, 40 Am. Rep. 1; Jordan *v.* Benwood, 42 W. Va. 312.

As to whether a municipal corporation in providing drains or sewers exercises a discretionary and legislative power, see Burnett *v.* Mayor, etc., of City of New York, 1 Mun. Corp. Cas. 75, and *notes*, 77 *et seq.*

As to whether a municipal corporation is liable for the negligent exercise, or non-exercise, of its discretionary powers of a public or legislative character, see Wheeler *v.* City of Poplar Bluffs, *ante*, 20 and *note*, 28 *et seq.*

SCHRODER

v.

OVERMAN, CLERK, *et al.*

(*Supreme Court of Ohio, Oct. 24, 1899.*)

Local Assessments—Sufficiency of Proceedings—Right to Enjoin.—Where, in a suit brought to enjoin the collection of a street assessment as invalid, and the taking of property without due process of law, it appears that the ordinance levying the assessment provided that the cost and expense of the improvement should be assessed upon the abutting property by the foot front, and not otherwise, but it also appears that an issue was made by the pleadings on the question whether or not the land so assessed was in fact benefited by the improvement to an amount in excess of the cost so assessed, which issue is found by the trial court against the plaintiff, and it is neither shown nor claimed that the cost and expense was not apportioned fairly between the property of plaintiff affected by the assessment and that of others so affected, the collection of such assessment should not be enjoined simply because the proceedings of the council in enacting the ordinance and levying the assessment, do not show affirmatively that the question of benefit to the land was taken into consideration in levying such assessment.

Same—Subdivision of Land—Duty of City Council.*—In providing for the cost and expense of such an improvement, abutting land, not laid out into lots, when the depth from the street is ascertained, is to be treated as a parcel of land for the purposes of assessment, and it is not the duty of the council to subdivide it, even though it may

*See generally extensive *note*, *ante* 257 *et seq.*

appear that the value of a portion of it, if assessed separately, would be less than four times the amount of the assessment levied upon the same after the improvement is made.

(Syllabus by the Court.)

ERROR by plaintiff to Hamilton county circuit court. *Affirmed.*

Case Stated.

The action below was against the defendant in error, Overman, as clerk of the village of St. Bernard, and the auditor and treasurer of Hamilton county, to perpetually enjoin the collection of an assessment which had been assessed by order of the village council upon plaintiff's lands abutting upon Church street, in that village, for the improvement of that street by grading, draining, and macadamizing the roadbed thereof. Among other things, the petition averred that the resolution and ordinance to improve and ordinance to assess for the improvement provided arbitrarily that plaintiff and all other property holders owning property abutting on the street should be assessed by the foot front, and not otherwise; that said rule of assessment is contrary to law and the constitution of Ohio and of the United States, in this: that it is an arbitrary assessment, without in any way being levied in accordance with any benefit conferred by said improvement. Also, that the improvement was not for any special benefit, nor of any benefit whatever, to the real estate owned by plaintiff and abutting said improvement, but, on the contrary, was a detriment and damage to her abutting property; and that the assessment is the taking of her property without due process of law, and to her great and irreparable injury. Also that the resolution and ordinance to improve provided that the assessment should extend only to the depth of 150 feet back from the line of the street upon the lands which were not subdivided into lots, and that a portion of plaintiff's land was not subdivided into lots, but was land in bulk; and that the assessment was in excess of 25 per cent. of the fair market value of said lands to the depth of 150 feet after the improvement was made. The allegation

that the action of the council in reference to making the improvement provided that the same should be assessed by the foot front and the allegation that a portion of plaintiff's abutting lands was land in bulk were admitted by the answer. All other allegations were denied. At the trial in the circuit court, to which the cause had been appealed, the issues were found for defendants, the assessment found to be a valid and subsisting lien against the premises, and the petition of the plaintiff was ordered dismissed, and judgment for costs awarded. At request of plaintiff the court stated separately its findings of fact, and, among other things, found that "the plaintiff was the owner of property abutting on the north side of said Church street, having in all a frontage of 857.33 feet; that said frontage consists of lot No. 55, fronting 90 feet on said street, and of land in bulk fronting 767.33 on the north side of said Church street, and that said land in bulk was assessed to the depth of 150 feet, said distance being the average depth of lots in the neighborhood. And the court further finds that the value of said lot No. 55 after said improvement was made was more than four times the amount of the assessment levied and assessed against said lot; and that the residue of said 857.33 feet front, after deducting therefrom 90 feet, the frontage of said lot 55, leaving a frontage on said improvement of 767.33 feet to a depth of 150 feet, was in one tract, of which about 250 feet was considerably below the grade of said street, and had a ravine through it, and was used for pasturage purposes; and the court finds that if the said part of the premises of the plaintiff should be assessed separately from the remainder of the tract on which the dwelling house is situated, the value thereof would be less than four times the assessment levied upon the same, after said improvement was made. But the court further finds that the value of the whole of said tract, with a frontage of 767.33 for a depth of 150 feet, after the improvement was made, was much more than four times the amount of the assessment levied against the same, and that said tract of 767.33 feet in front, to a depth of 150 feet, is for the purposes

of said assessment to be considered as a single and undivided tract. * * * The court finds that the improvement of said Church street is a benefit to plaintiff's said property, and that the amount of the benefits to said property is more than the amount of said assessment against the same." To reverse the judgment so rendered this proceeding in error was brought.

Theodore Horstman, for plaintiff in error.

Samuel B. Hammel and *Rendigs, Foraker & Dinsmore*, for defendants in error.

SPEAR, J. (after stating the facts). The preliminary statement presents the question whether the proceedings relating to the assessment were invalid (1) because the assessment against plaintiff's lands was by the foot front; or (2) because the improvement was not of any benefit to the lands, but rather a damage, and that, therefore, the assessment was the taking of plaintiff's property without due process of law; or (3) because the assessment was in excess of 25 per cent. of the fair market value of the plaintiff's lands to the depth of 150 feet after the improvement was made.

1. As to the assessment by the foot front. It is conceded that, should the court be governed by its previous decisions, notably Ernst *v.* Kunkle, 5 Ohio St. 520, Upington *v.* Oviatt, 24 Ohio St. 232, and Findlay *v.* Frey, 51 Ohio St. 390, 38 N. E. 114, the assessment could not be held invalid simply because it was undertaken to be made by the foot front. But the contention of plaintiff is that the case at bar is controlled by the recent decision of the supreme court of the United States in the case of Village of Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187. And it may be conceded that, if the principle of the above case applies to the case made by the record in this case, the assessment would, of necessity, be held invalid, and the judgment below reversed. We look, therefore, to the record of the Norwood Case, to see whether or not we have a like case here. The defendant in error in that

Local Assessments—Sufficiency of Proceedings—Right to Enjoin.

case, Mrs. Baker, owned land in the village of Norwood through which the village authorities opened a street by a proceeding in condemnation, and paid to her the ascertained value of her land, assessed irrespective of benefit to her, *viz.* $2,000. By proceedings by and before the village council the cost and expense of the condemnation, including the compensation thus paid, cost of the condemnation proceedings, cost of advertising, and all other costs, amounting in all to $2,218.58, were assessed against the abutting property of Mrs. Baker, and the same was entered upon the tax duplicate, and sent to the county treasurer for collection as a lien and charge against the abutting property so assessed. The ordinance provided that such cost and expense of the condemnation of the property "should be assessed per foot front upon the property bounding and abutting." This upon the supposed authority of section 2264, Rev. St., which provides: "The council may decline to assess the cost and expenses in the last section mentioned, or any part thereof, or the costs and expenses of any part thereof of such improvement, except as hereinafter mentioned, on the general tax list, in which event such costs and expenses, or any part thereof, which may not be so assessed on the general tax list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed may determine before the improvement is made, and in the manner and subject to the restrictions herein contained. * * *" Mrs. Baker commenced a suit in equity in the circuit court of the United States for the Southern district of Ohio to enjoin the collection of the assessment. A decree having been rendered in her favor in that court, the case was appealed to the supreme court. Her suit in both courts proceeded upon the ground that the

ssessment in question was in violation of the fourteenth mendment, providing that no state shall deprive any person f property without due process of law, nor deny to any per- on within its jurisdiction the equal protection of the laws, as ell as of the bill of rights of the constitution of Ohio. This ontention was sustained, the court holding in the syllabus iat: "The principle underlying special assessments upon rivate property to meet the cost of public improvements is iat the property upon which they are imposed is peculiarly enefited, and therefore the owners do not in fact pay any- iing in excess of what they receive by reason of such nprovement. The exaction from the owner of private prop- rty of the cost of a public improvement in substantial excess f the special benefits accruing to him is, to the extent of ich excess, a taking, under the guise of taxation, of private roperty for public use without compensation. * * * he constitution of Ohio authorizes the taking of private roperty for the purpose of making public roads, but requires compensation to be made therefor to the owner, to be ssessed by a jury, without deduction for benefits. The tatutes of the state * * * make provision for the man- er in which this power is to be exercised. In the case of ie opening of a new road they authorize a special assess- ient on bounding and abutting property by the front foot or this entire cost and expense of the improvement, without iking the special benefits into account. The alleged improve- ient in this case was the construction through property of ie appellee of a street 300 feet in length and 50 feet in width, o connect two streets of that width running from each end i opposite directions. In the proceedings in this case the orporation of Norwood manifestly went upon the theory iat the abutting property could be made to bear the whole ost of the new road, whether it was benefited or not to the xtent of such cost, and the assessment was made accord- igly. This suit was brought to obtain a decree restraining ie corporation from enforcing the assessment against the laintiff's abutting property, which decree was granted.

Held, that the assessment was, in itself, an illegal one, because it rested upon a basis that excluded any consideration of benefits. * * *"

It is important to note that the record nowhere shows that the question of benefits to the property assessed was considered by the council, and that there is an absence of any showing that the property was benefited; and it seems to be apparent from the foregoing, that the gist of the holding is that the proceeding of council, having been conducted upon a rule which excluded the consideration of the question of benefits, and placed the burden upon the land on a theory inconsistent with such consideration, the assessment is, therefore, an illegal one. This conclusion is further shown by the language of the majority opinion delivered by MR. JUSTICE HARLAN. At page 278, 172 U. S., and page 190, 19 Sup. Ct., these words: "But does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?" Again, at page 279, 172 U. S., and page 190, 19 Sup. Ct., this language: "But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may

be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." And at page 290, 172 U. S., and page 195, 19 Sup. Ct., after referring to the provisions of section 2264, Rev. St., this: "It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the foot front for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost." Also, at page 294, 172 U. S., and page 196, 19 Sup. Ct., this: "While abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it,—that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over benefits will, to the extent of such excess, be a taking of private property for public use without compensation." Again, at page 293, 172 U. S., and page 196, 19 Sup. Ct., referring to the decree of the circuit court, this language is found: "It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the

village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found on due and proper inquiry to be equal to the special benefits accruing to the property." MR. JUSTICE GRAY, MR. JUSTICE SHIRAS, and MR. JUSTICE BREWER dissented from the judgment of the majority. The dissent seems to be based upon the proposition that the fixing of the limits of the taxing district is a legislative function, properly determinable by the council, and that the determination is conclusive. In the dissenting opinion of MR. JUSTICE BREWER, on page 302, 172 U. S., and page 199, 19 Sup. Ct., occurs this language: "The testimony is equally silent as to the matter of damages and benefits. There is not only no averment, but not even a suggestion, that any other property than that abutting on the proposed improvements, and belonging to plaintiff, is in the slightest degree benefited thereby. Nor is there an averment or suggestion that her property, thus improved by the opening of a street, has not been raised in value far above the cost of improvement. So that the legislative act charging the cost of improvement in laying out a street (and the same rule obtains if it was the grading, macadamizing, or paving of the street) upon the property abutting thereon is adjudged not only not conclusive that such property is benefited to the full cost thereof, but, further, that it is not even *prima facie* evidence thereof, and that, before such an assessment can be sustained, it must be shown, not simply that the legislative body has fixed the area of the taxing district, but also that, by suitable judicial inquiry, it has been established that such taxing district is benefited to the full amount of the cost of the improvement, and also that no other property is likewise benefited. The suggestion that such an assessment be declared void because the rule of assessment is erroneous, implies that it is *prima facie* erroneous to cast upon property abutting upon an improvement the cost thereof;

that a legislative act casting upon such abutting property the full cost of an improvement is *prima facie* void; that, being *prima facie* void, the owner of any property so abutting on the improvement may obtain a decree of a court of equity canceling *in toto* the assessment, without denying that his property is benefited by the improvement, or paying, or offering to pay, or expressing a willingness to pay, any sum which may be a legitimate charge upon the property for the value of the benefit to it by such improvement." Enough has been given, we think, to make it clear that the ground of the relief granted to the landowner by the circuit court, sustained by the supreme court, was that there had been an assessment against her lands, without regard being had to the question whether or not the lands would be benefited by the improvement; the difference of opinion among the members of the court seeming to be that while, by the majority, the action of the council, as exhibited in the record, was considered as conclusively showing that no attempt had been made to assess according to benefits, the minority held to the opinion that the action taken by the council impliedly shows that benefits were considered, and that at least the record establishes *prima facie* that the assessment was legal. In either view it seems to us apparent that, had the record shown affirmatively that the lands were benefited to an amount equal to the cost of the improvement so assessed, no injunction restraining the collection of the assessment could properly have been allowed.

How is it with the case at bar? The record discloses that the question of benefits to the land assessed was made an issue, being tendered by the plaintiff herself, and that upon that issue the finding of the trial court is distinct that "the improvement of Church street is a benefit to plaintiff's said property, and that the amount of benefit to said property is more than the amount of said assessment against the same." Perhaps this finding may be assumed to involve also the conclusion, inferentially, that the cost and expense of the improvement had been properly apportioned among the lots and lands benefited thereby. However, this latter suggestion may

be unimportant in view of the fact that there is in the present case no claim that the cost and expense of the improvement had not been apportioned fairly between the property of plaintiff affected by the assessment and that of others so affected. Undoubtedly, as has been held by this court again and again, the principle which permits the assessment of the cost of local improvements upon abutting and contiguous lands is that such property receives benefit beyond that common to the public at large, and the conclusion would naturally follow, and does follow, that such assessment can in no case, save by express consent of the owner, lawfully exceed such benefit. It follows, further, that any system which results in imposing such assessments without respect to benefits must be vicious and unsound. But we are dealing with a case where the court has determined, upon a trial, that the benefit in fact exceeds the amount of the assessment, and yet where the plaintiff asks the interposition of a court of equity to prevent the commission of an alleged wrong upon her property. We are of opinion that the Norwood Case does not control the case at bar, and that the relief prayed for should not be granted simply because the proceedings of the council do not show affirmatively that the assessment was assessed according to benefits, nor that the subject of benefits was not, by that body, taken into consideration. The questions involved are of high importance to many of the municipalities of the state, as the validity of a large number of assessments is likely to be affected by the disposition of the issues as they shall finally be determined. We, of course, bow cheerfully to the judgment of the supreme court of the United States in all cases coming within its cognizance, but at the same time feel that it is our duty to follow the decisions of this court, except where they have been distinctly overruled by that court, or are clearly inconsistent with its holdings. A public duty will be performed by the submission of the issues in this case to that tribunal for its judgment thereon.

2. The foregoing sufficiently disposes of plaintiff's second proposition, and no further comment on that is needed.

3. Does the record show that the assessment was in excess of 25 per cent. of the fair market value of the lands to the depth of 150 feet after the improvement was made? The plaintiff owned a parcel of land fronting over 700 feet on the street. It was in one tract,— land in bulk, in other words. A considerable part (some 250 feet of frontage) was below the grade of the street, and had a ravine through it, and was used for pasturage purposes. If that part should be assessed separately from the remainder of the tract, on which the dwelling house is situated, the value would be less than four times the assessment for the improvement. But the value of the whole tract to a depth of 150 feet, after the improvement was made, was much more than four times the amount of the assessment. The contention is that the council, and upon its neglect to do so the court, should have divided the parcel thus standing in bulk, and that the court should grant relief by enjoining the assessment as to that portion which is in value less than four times the amount of the assessment. There is plausibility in the claim that the rule adopted reaches an unfair and inequitable result, and perhaps it is sufficiently important to call for legislative action on the subject. But we are of opinion that the authorities giving construction to the statutes are against the claim as a legal proposition. Section 2269, Rev. St.; City of Cincinnati *v.* Oliver, 31 Ohio St. 371; Griswold *v.* Pelton, 34 Ohio St. 482.

Same—Subdivision of Land—Duty of City Council.

Other questions are argued. We have considered them, but do not regard any as requiring a reversal of the judgment. Judgment affirmed.

STATE (COWARD *et al.*, PROSECUTORS)

v.

MAYOR, ETC., OF NORTH PLAINFIELD.

(*Supreme Court of New Jersey, March 20, 1899.*)

Titles of Statutes.—The legislative purpose to confer the right of eminent domain upon a municipality can fairly be inferred from the title "An act for the formation of borough governments."

Special Assessments—Qualifications of Commissioners.—Under a statute requiring all commissioners, having the duty of determining how far the benefits of a proposed street improvement extend, to be resident freeholders of the borough, the commissioners are necessarily required to determine whether or not the area of benefit includes lands which they own, no matter in what part of the borough they may be located, and, unless it clearly appears that their determination is not warranted by the facts, their conclusion on this point should not be interfered with.

Same—Validity of Assessment—Certiorari.—Where the prosecutors have not been injuriously affected in their property rights by the action of such commissioners in assessing a portion of the cost of street improvements against the taxable property of the borough generally, such action, even if unwarranted affords no ground for the allowance of a *certiorari*.

Same—Same—Same.*—An assessment for street improvements which results in arbitrarily dividing lots which are used and held as one plot of ground, and in placing an assessment upon only the portions thereof as are within the selected area, is illegal, but will only justify the vacation of the assessments upon the lots bisected, where other property owners are not injured thereby.

Case at Bar.—Such statute provides for the selection of certain freeholders, whose judgment on the amount of the special benefit accruing to abutting property from a street improvement is to be accepted as accurate, unless it is made to appear, by clear and convincing proof, to be erroneous, and no such proof appears in the case at bar.

CERTIORARI by the state to set aside a special assessment.

*See generally extensive *note*, *ante* 257 *et seq.*

State *v.* Mayor, etc., of North Plainfield

Argued June term, 1898, before LIPPINCOTT and GUMMERE, JJ.

Craig A. Marsh and *Thomas N. McCarter, Jr.*, for prosecutors.

Charles A. Reed, for defendant.

GUMMERE, J. The prosecutors in these writs seek to set aside an assessment for benefits for the laying out and opening of Wachung avenue, in the borough of North Plainfield. The first reason which they assigned for attacking the assessment is that the act under which the improvement was made is unconstitutional, because its object is not expressed in its title. The title of the act is, "An act for the formation of borough governments" (1 Gen. St. p. 179); and it is contended that there is nothing in this title to suggest in the remotest way the legislative purpose to confer the right of eminent domain upon the municipality. We think that such power can fairly be inferred from this title. There are many acts upon our statute books which confer the power of eminent domain, under titles no more suggestive than is that of the present act, and which have been held to comply with this constitutional provision. "An act for the formation of railroad companies, and to regulate the same," the supplement to "An act to incorporate and regulate telegraph companies," the special charters incorporating railroad companies, and the various city charters of the state, are examples of such legislation.

Case Stated.

Titles of Statutes.

The next ground upon which the assessment is sought to be set aside is that one of the commissioners (JUSTUS H. COOLEY) was not a disinterested person, and therefore was not qualified to act as such commissioner. The evidence taken in the case shows that this commissioner at the time of his appointment was the owner of two lots, located about 100 or 150 feet beyond the area of benefit, as fixed by the commissioners; and the argument is that, as one of the duties of

Special Assessments—Qualifications of Commissioners.

the commissioners was to determine how far the benefit of this improvement extended, and consequently to determine whether or not Cooley's lots were benefited, the necessity of his passing upon the question disqualified him. We do not think there is any merit in this ground of attack. The statute under which these proceedings have been had requires that the commissioners shall all of them be resident freeholders of the borough. That being so, they are necessarily required to determine whether or not the area of benefit includes the lands which they own, no matter in what part of the borough they may be located; and, unless it clearly appears that their determination is not justified by the facts, their conclusion on this point should not be interfered with. Jelliff *v.* Newark, 48 N. J. Law, 101, 2 Atl. 627. An examination of the testimony justifies the conclusion that Mr. Cooley was a disinterested freeholder, within the meaning of the act.

It is further alleged, as a reason for setting aside this assessment, that the commissioners illegally assessed $11,044 against the taxable property of the borough generally. This sum was the amount remaining of the cost of the improvement, after deducting all sums which had been assessed against property specially benefited thereby. The statute under which these proceedings were had provides that, in case the costs and expenses of the improvement shall exceed the special benefits, the excess shall be paid out of the general road tax. That tax is assessable against the taxable property of the borough, and it is therefore apparent that, even if the assessment of this sum against the taxable property of the prosecutors was set aside, the prosecutors would not be relieved from finally paying so much thereof as would be assessable against them, as taxpayers of the borough, in the shape of a road tax. This action of the commissioners, therefore, assuming it to be unwarranted, has not in any way injuriously affected the prosecutors in their property rights, and consequently it affords no ground for the allowance of a *certiorari*. Jersey

Same—Validity of Assessment—Certiorari.

City *v.* Traphagen, 53 N. J. Law, 434, 22 Atl. 190, and cases cited.

Another reason urged on behalf of the prosecutors is that the commissioners, having decided that lands assessed on the northeasterly side of Wachung avenue, lying beyond an imaginary line drawn midway between that avenue and Somerset street, and lands on the other side of said avenue lying beyond an imaginary line drawn parallel with, and 350 feet distant from it, were not benefited by the improvement, assessed only such lands as lay within these lines. The result of this action was to arbitrarily divide the lots of some of the prosecutors, which were used or held as one plot of ground, and to place an assessment upon only such portions thereof as lay within the selected area. The viciousness of this method of assessment has been pointed out by the court of errors and appeals in the case of Aldridge *v.* Board, 51 N. J. Law, 170, 16 Atl. 695. But, although this method is illegal, it will only justify the vacation of the assessments so far as those prosecutors are concerned whose lots have been bisected and assessed in the manner complained of. As to the other prosecutors, such illegality does not seem to have worked any harm to them. A very considerable part of the cost of the improvement has been assessed upon the borough at large, and there is nothing in the proofs to suggest that the result of this error has been to impose upon their lands more than a proper assessment. State *v.* City of Newark, 45 N. J. Law, 104; Davis *v.* City of Newark, 54 N. J. Law, 147, 23 Atl. 276. Same—Same—Same.

Still another reason relied on for setting aside this assessment attacks the judgment of the commissioners in fixing the amount of the benefits received by the several prosecutors. We are asked to disregard their judgment, and accept as accurate that of certain other residents of the borough who testified for the prosecutors on that subject. The statute under which this assessment is made provides for the selection of certain freeholders, whose judgment on the amount of the benefit received is to be accepted Case at Bar.

as accurate, unless it is made to appear, by clear and convincing proof, to be erroneous. Jelliff *v.* Newark, *supra*; Burlington *v.* Atlantic, 49 N. J. Law, 408, 8 Atl. 111; Hegeman *v.* City of Passaic, 51 N. J. Law, 109, 16 Atl. 62; Raymond's Estate *v.* Borough of Rutherford, 55 N. J. Law, 446, 27 Atl. 172. We find nothing in the proofs of this case which convinces us that the commissioners erred in determining the amount to which the lands of the respective prosecutors were benefited.

The other reasons advanced by the prosecutors are not of sufficient importance to require special discussion. It is enough to say that each of them has been considered by us, and that we find nothing in them which would warrant our interfering with this assessment.

The result of our examination of this case leads us to the conclusion that those of the prosecutors whose lots have been bisected by the arbitrary lines of limitation above referred to, and the parts thereof lying within those lines subjected to assessment, are entitled to have their assessments set aside. As to the other prosecutors, our conclusion is that their assessments should be affirmed. The successful parties in each of these writs are entitled to costs.

CITY OF LOUISVILLE
v.
SELVAGE.

SELVAGE
v.
LUCAS.

(*Court of Appeals of Kentucky, June 2, 1899.*)

Ordinances—Statutory Requirement.*—The statutory requirement that two weeks must elapse between the passage of an improvement ordinance by the board of councilmen and its passage by the board

*See generally extensive *note*, *ante* 257 *et seq.*

of aldermen, is sufficiently complied with where it is passed by the former on the 17th of the month and by the latter on the 31st, it not being necessary that 14 full days should intervene.

Pleading.—It was error to sustain the demurrer to the petition upon the ground that it failed to aver that the city council had fixed the grade of the street to be improved, as it contained an averment to that effect.

Street Improvements—Apportionment.*—Where property is not divided into squares, gross inequality in apportioning the cost of a street improvement upon the two sides of the street cannot be permitted.

Same—Same—Pleading.—Although the amount which an assessment for street improvements has been increased on account of a guaranty from the contractor to keep the improvement in repair for a certain period cannot be recovered by the contractor against the property holder, a petition claiming such amount is not, therefore, fatally defective.

Same—Same—Authority to Correct.*—The provisions of the act for the government of cities of the first class that "no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract, but the general council, or the courts in which suits may be pending shall make all corrections, rules, and orders to do justice to all parties concerned" authorize the court in which an action to recover the cost of a street improvement is brought to correct the apportionment, etc., when the correction can be made on the averments of the petition.

Same—Same—Same—Pleading.—It is the duty of the court to make such corrections under a prayer for all general relief.

Interest.—In an action by the contractor upon apportionment warrants, neither the city nor the property holder is liable for the costs or interest until the apportionment is corrected.

APPEALS by plaintiff and defendant city from Jefferson county chancery division circuit court. *Reversed.*

H. L. Stone, for appellant city of Louisville.
William Krieger and *R. T. Colston*, for appellant Selvage.
Lane & Burnett, for appellee Lucas.

DU RELLE, J. Selvage brought suit, for the use of the Western Bank, against appellees Lucas and others, upon apportionment warrants for the improvement of Hill street

*See generally extensive *note*, *ante* 257 *et seq.*

from the center line of Fifth street and St. James court to the east line of Sixth street, under an ordinance providing for the improvement of the carriageway of the part of Hill street mentioned with vitrified brick pavement, and for making footway crossings across intersecting streets and alleys. The ordinance provided that the cost of the improvement should be apportioned against the land contiguous thereto on the south included in the quarter squares abutting upon the improvement, and upon the contiguous territory on the north as far as a line 522.29 feet north of and parallel with Hill street. A demurrer to the petition was sustained, an amended petition was filed, and to the petition as amended a demurrer was filed and sustained. The plaintiff declined to plead further, and judgment was rendered dismissing the petition, but giving judgment over against the city of Louisville under the alternative prayer in the petition. Both the city and the contractor have appealed from this judgment.

Ordinances—Statutory Requirement.

One of the grounds urged in support of the demurrer was that two weeks had not elapsed between the passage of the ordinance by the two boards, it being passed by the board of councilmen on March 17th and by the board of aldermen on March 31st. This question has been settled in the case of Fehler *v.* Gosnell, 99 Ky. 385, 35 S. W. 1125.

Pleading.

The trial court, in a brief opinion, sustaining the demurrer, referred to the opinion in Zable *v.* Orphans' Home, 92 Ky. 89, 17 S. W. 212, with regard to the fixing of the grade of the street improved. In that case the petition was held defective, as failing to aver that the city council had fixed the grade of the street; but the court evidently overlooked the averment in the original petition in this case fixing the grade of Hill street within the limits improved.

The main contention on behalf of appellees in support of the proposition that the petition was fatally defective is based upon the provision of the ordinance fixing the limits of the territory to be assessed, and the averments of the

original and amended petitions with respect thereto. The original petition alleged specifically that the territory on the south of Hill street was divided into squares by principal streets, which were named, and their situation stated. But it was averred that on the north of the improvement the territory was not divided into squares by principal streets, but that at the time of the passage of the ordinance it was expected and believed that Magnolia avenue would be opened and dedicated as a public street, and extend parallel with Hill street at a distance of 1,104.59 feet north, and that no other street would be opened or dedicated between Hill street and Magnolia avenue between the eastern and western limits of the improvement. This would make the center line between Hill street and Magnolia avenue coincide with the northern limit of the assessment district as fixed by the ordinance. The rulings of this court in Preston *v.* Roberts, 12 Bush, 570, that, where property was not divided into squares, gross inequality in apportioning the cost of an improvement upon the two sides could not be permitted, would seem to be applicable to this apportionment under the averments of the original petition, though in a number of cases such inequality has been held unobjectionable where the property was divided into squares by principal streets. Nevin *v.* Roach, 86 Ky. 499, 5 S. W. 546; Cooper *v.* Nevin, 90 Ky. 85, 13 S. W. 841; Baker *v.* Selvage, 7 Ky. Law Rep. 838. But in the amended petition all the averments as to the contiguous territory upon the north of Hill street not being divided into squares by principal streets were withdrawn, as having been made by mistake, and it was averred "that the territory on the north side of Hill street, * * * contiguous to the improvement, * * * is a square bounded on all sides by principal streets, * * * on the north by Victoria Place, which latter street is parallel to and 1,104.58 feet north of and parallel with Hill street"; with a further averment that it was not intended or probable that the city would ever open another principal street through said square. This averment is relied upon by appellant Selvage and by the city to sustain the legality of the apportionment alleged

in the petition, upon the theory that, though it was unnecessary to allege how far distant the assessment limit upon the north was from Hill street, the limit which was alleged coincided with the center line of the square described in the amended petition. But there is no averment that at the time the ordinance was passed providing for the improvement any such street existed as Victoria Place; and this, it seems to us, is fatal to the contention of appellants, Selvage and the city, upon this point. Under the pleadings in this case, appellant Selvage was not entitled to recover according to the apportionment approved by the general council.

Street Improvements—Apportionment.

A further ground relied on by appellees Lucas and others is that the general ordinance concerning the improvement of streets required from the contractor a guaranty to keep the pavement in repair for five years, and to deposit bonds equal in amount to 10 per cent. of the contract price as security for such repair, it having been held in Fehler *v.* Gosnell, 35 S. W. 1125, that the amount which such an assessment had been increased on account of that guaranty could not be recovered by the contractor against the property holder, but was properly chargeable against the city at large. A further objection by appellees was that the ordinance provided for the assessment of the cost of the footway crossings against the contiguous property, and that this cost under "An act to amend the charter of the city of Louisville" (Burnett's Code, p. 515), provided that the cost of such crossings should be paid by the city of Louisville out of a tax authorized to be imposed by the city, and therefore cannot be assessed against the property holder. But, while these objections are ample to prevent the recovery of the amounts apportioned and claimed in the petition, they do not, in our opinion, render the ordinance void, or the petition fatally defective. The question as to the 10 per cent. guaranty has already been passed upon in the case of Fehler *v.* Gosnell, *supra*, and it was there held that the contractor

Same—Same—Pleading.

was still entitled to recover, except to the extent the property holder's assessment had been increased on account of the guaranty. It was also there held that under the provisions of the act for the government of cities of the first class that "no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract, but the general council, or the courts in which suits may be pending, shall make all corrections, rules, and orders to do justice to all parties concerned [Ky. St. § 2834]," the court should correct the apportionment, and render judgment for the amounts which should have been assessed against the property. We see no valid reason why the rule so laid down does not apply equally to the attempted assessment of the cost of footway crossings, and to the inequality of the apportionment as between the two sides of the street, if the facts be as stated in the original opinion. The averments of the petition showed the cost, under the contract, of each part of the improvement made, and in the late case of Gosnell *v.* City of Louisville, 46 S. W. 722, we held that 10 per cent. of the contract price was a fixed and liquidated proportion thereof for the repairs contemplated by the guaranty, and that that amount was the proportion of the contract price from the payment of which the property holders were exempted. There would seem, therefore, to be little difficulty in the court making a correction of the apportionment upon the averments of the petition in this case. It is true that this relief is not expressly prayed in the petition, but section 2834, Ky. St., would seem to require the court to make such correction under the prayer for all general relief. Of course, under the doctrine in Gosnell *v.* City of Louisville, *supra*, neither the city nor the property holder is liable for the costs or interest until the apportionment is corrected. For the reasons stated, the judgment is reversed, with directions for further proceedings in conformity with this opinion, all parties being allowed to amend if desired.

Same—Same—Authority to Correct.

Same—Same—Same—Pleading.

Interest.

FLEETWOOD

v.

READ.

(*Supreme Court of Washington, Oct. 13, 1899.*)

Licenses—Municipal Authority.—Under an unrestricted authority to grant licenses for any lawful purpose, a city may impose licenses for the purpose of raising revenue.

Licenses—Special Privileges—Constitutional Law.—An ordinance imposing a license upon every merchant who shall use trading stamps or other similar devices for the sale of goods is not subject to the constitutional objection that it imposes a burden upon a portion, and not the whole, of a class of merchants.

Same—Fees.*—It cannot be held that such an ordinance imposes an excessive burden in fixing the license fee at $100, per annum.

Same—Taxation—Uniformity—Constitutional Law.†—Such an ordinance cannot be in conflict with the usual constitutional provisions in relation to uniformity of taxation, as it does not impose a property tax within the meaning of such provisions.

APPEAL by petitioner from Pierce county superior court. *Affirmed.*

Fenley Bryan, for appellant.

W. H. Prichard and *Walter M. Harvey*, for respondent.

DUNBAR, J. The city of Tacoma passed the following ordinance: "Be it ordained by the city of Tacoma: "Section 1. Every person, firm or corporation within the city of Tacoma who shall use any stamps, coupons, tickets, cards or other devices for the sale of goods, wares and merchandise, which said stamps, coupons, tickets or other similar devices shall entitle the purchaser receiving the same to procure from any other firm

Case Stated.

*See City of Walla Walla *v.* Ferdon (Wash.), 2 Mun. Corp. Cas. 434, and *note*, 439.

†See *note*, 1 Mun. Corp. Cas. 97 *et seq.*

or corporation any goods, wares or merchandise free of charge upon production of any number of said stamps, tickets, coupons, cards or other similar devices, shall, before using the same, obtain a license therefor from the city clerk.

"Sec. 2. Before obtaining such license the person applying therefor shall pay to the city treasurer the sum of one hundred dollars; and upon such payment being made, and filing a receipt therefor with the city clerk, the city clerk shall issue to the firm or corporation making such payment a license to use, for one year, the stamps, coupons, tickets, cards or other similar devices mentioned in section 1 of this ordinance.

"Sec. 3. That any person violating the provisions of this ordinance shall be punished by a fine of not less than fifty dollars, and not exceeding one hundred dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment."

The appellant, Fleetwood, was charged with violating this ordinance; was tried before a justice of the peace, found guilty, and sentenced to pay a fine of $50. In default of payment he was committed to jail, his custodian being the chief of police of the city of Tacoma; whereupon the said Fleetwood made application by petition to the Honorable Thomas Carroll, one of the judges of the superior court of Pierce county, for a writ of *habeas corpus*, setting forth that the only cause or pretense of his confinement and restraint was the violation of said ordinance, and that the said ordinance is void, because the said city of Tacoma had no authority or power to enact or enforce it; that said ordinance is in conflict with the constitution of this state; that it is unreasonable, and that it requires a portion, and not the whole, of a class to pay a license for the transaction of business. So that the only question here is as to the validity of the ordinance. It is urged by the appellant that there are two kinds of licenses which may be imposed by municipal governments: (1) Licenses imposed in the exercise of the

ordinary police powers of the city; (2) licenses imposed for the sole purpose of raising revenue, or in the exercise of the power of taxation; and that licenses cannot be imposed for either of these purposes unless the power has been conferred upon the municipality attempting to do so by the legislative act under which it is organized and created; and authorities are cited to show that a grant of power to impose licenses in the exercise of the police power does not confer authority to impose a license for the purpose of raising revenue. It is assumed by the appellant that it follows that, if the ordinance in question has no relation to the exercise of the police power, and is only an attempt to raise revenue by license, and the legislature has granted the city of Tacoma power to issue licenses only in the exercise of the police power, the ordinance is void. We do not think it is necessary to follow counsel for appellant in his attempt to show that the ordinance in question is an ordinance regulating the exercise of the police power, for it may be conceded, we think, that, as the term "police power" is ordinarily used, there is no police power exercised by virtue of this ordinance. It is boldly asserted, however, by the respondent, that under the power granted by the legislature not only is the city authorized to pass ordinances controlling the exercise of the police power, but it is authorized to pass ordinances for the purpose of raising revenue only. The law which authorized this ordinance, if it is authorized, is subdivision 33, § 739, 1 Ballinger's Codes & St., and is as follows: "To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor, and to provide for revoking the same." This provision is in relation to cities of the first class. We do not think the restricted interpretation urged by the appellant can be placed upon this statute. The language is comprehensive. The authority is to grant licenses for any lawful purpose, and, in the absence of restriction, the purpose of raising revenue is as lawful as the purpose of exercising the police power. This interpretation is borne out, we think, by the authoriza-

Licenses—Municipal Authority.

tion of the legislature to cities of other classes. Subdivision 10 of section 938—the act in regard to general powers of the cities of the third class—authorizes the city to license, for purposes of regulation and revenue, all and every kind of business; and subdivision 10 of section 1011, in defining the powers of cities of the fourth class, provides that the city shall have power to license, for the purposes of regulation and revenue all and every kind of business. And so the power to license for purposes of revenue is especially granted to all the other classes of cities. But we do not think that the authorization in this respect of cities of the other classes is any stronger than the authorization of cities of the first class, where the power is to grant licenses for any lawful purpose, which must be held to include purposes embraced in the provisions in relation to the other cities; and, taking into consideration the whole scope of the legislative provisions in this state, as well as the language especially used in relation to cities of the first class, we think it is plain that no discrimination was intended by the legislature. The legislature probably intended by this sweeping and comprehensive provision to put at rest any legal questions which might be raised by an attempt to specify particularly the powers conferred, or the particular subjects falling within the general provision,—questions which are frequently raised under the rule that the expression of one thing excludes the others. It is true, as stated by appellant, that the language used, *viz.* "and provide for revoking the same," may seem to be a little awkward and unnecessary in this connection. Still a case might be conceived where it would be necessary to revoke a license even where the object of the license was to obtain revenue. But, in any event, the intervention of this seemingly unnecessary provision would not be sufficient to destroy the interpretation which, it seems to us, the broad language of the statute thoroughly warrants. We have examined all the cases cited by the appellant, but, with the exception of one or two, they do not seem to us to be in point,

and those, we think, do not express the established and almost uniform law on the subject.

It is insisted, also, that the ordinance is void because it imposes a burden upon a portion, and not the whole, of a class of merchants. We do not think this contention is tenable. The ordinance does apply to all merchants who see fit to engage in the business of buying tickets of that kind, and the constitutional provision that no law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations, cannot be invoked against this ordinance. The adjudicated cases in this respect are so numerous that it is scarcely worth while to mention them here.

Licenses—Special Privileges—Constitutional Law.

The ordinance cannot be held void on account of excessive burden imposed. It is not so oppressive that it will in any way interfere with the rights of merchants. However wrong the policy may be which prompted the enactment of this ordinance, or however doubtful the propriety of passing such an ordinance, those are questions which are submitted by the legislature to the discretion of the council, and upon them it is not our province to comment. We think, without further investigation, that there is no doubt that the ordinance is warranted by legislative authority.

Same—Fees.

Some question was raised by the court at the time of the argument of this case in relation to the ordinance being in conflict with sections 1, 2, and 9 of article 7 of the state constitution, which provide for uniformity in taxation. Counsel for the respondent was requested by the court to furnish it with a brief on that subject, which he did, and upon an examination of the cases cited and of other cases we have become convinced that the question raised by the court was not a question pertinent in this case; that, under the great weight of authority, a tax on occupation, business, etc., is not, in legal

Same—Taxation—Uniformity—Constitutional Law.

contemplation, a tax on property, which falls within the inhibition imposed by the usual constitutional provisions in relation to uniformity of taxation; and, in consideration of the fact that the state constitution is a limitation upon the actions and powers of the legislature instead of a grant of power, that the power of the legislature to tax trades, professions, and occupations is, in the absence of constitutional restriction, a matter within its absolute control, and resting entirely in sound legislative discretion. The judgment will be affirmed.

GORDON, C. J., and FULLERTON and REAVIS, JJ., concur.

CITY OF NEW ORLEANS

v.

KIENTZ.

(*Supreme Court of Louisiana, Feb. 5, 1900.*)

City Market—Power to Prohibit Sales Elsewhere.*—The city of New Orleans having the undoubted right and authority to establish markets for public health and convenience by ordinance, and to lease the same, has the authority, for the protection of its lessees, to pass an auxiliary ordinance prohibiting parties from selling at or near the markets products which are sold in the same. Morano *v.* Mayor, 2 La. 219, 220; State *v.* Sarradat, 15 South. 87, 46 La. Ann. 700, 24 L. R. A. 584.

Same—Privileges—Compulsory Taxation.—Having the authority to absolutely prohibit parties from selling at the public markets the products sold thereat, it has authority, with the consent of the lessees, to permit them to sell the same at the markets, on condition of their paying each day, for the privilege, the price paid daily by the occupants of stalls, where the privilege is extended to all alike. An ordinance granting such privilege does not impose a tax or compulsory license, as parties determine for themselves whether they shall sell or not.

(Syllabus by the Court.)

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*See notes at end of case.

City of New Orleans *v.* Kientz

APPEAL by defendant from New Orleans recorder's court. *Affirmed.*

Buck, Walshe & Buck, and *Sambola & Ducros*, for appellant.

Charles H. La Villebeuvre, Asst. City Atty., and *Samuel L. Gilmore, City Atty.*, for appellee.

NICHOLLS, C. J. Defendant appeals from a judgment rendered against him by the fourth recorder of the city of New Orleans condemning him to pay a fine of $25 or to an imprisonment of 30 days for having willfully and unlawfully and maliciously violated section 26 of Ordinance No. 4,155, C. S., as amended by City Ordinance No. 12,632, C. S., which reads: "That owners or persons in charge of any cart or wagon for the conveyance of vegetables to the public markets of this city shall have the right to back the same up to the banquettes around said markets, except between the hours of seven o'clock and ten o'clock a. m., which time is set aside for the cleaning and keeping the markets in proper sanitary condition, and shall have the right to sell and deliver vegetables from such carts or wagons at wholesale only, by which is meant selling to dealers for resale and shippers of vegetables; provided, that said owners or persons in charge of carts or wagons shall lease space and market room, not less than twelve and a half square feet in area, in said markets, and pay to the commissioner of police and public buildings, through his inspector, collector or collectors, or the lessee or lessees, or his or their collector or collectors, for the space and market room so leased by them at the rate of two cents per day for each and every square foot of space or market room leased; provided, that said sum shall not exceed twenty-five cents per day to each owner, owners or person in charge of carts or wagons; provided, further, that said owner or owners or person or persons, in charge of such carts or wagons may deliver goods previously sold to occupants of stalls or stands during any hour without occupying space in said market, and without the

Case Stated.

payment of any market fees or dues; and provided, further, that in taking their positions, said carts or wagons be separated at least three feet, in order to allow pedestrians to cross from one side of the street to the other; and that any violation of the above shall subject the offender to the penalty stipulated in section 32 of this ordinance; provided, further, that the owner or owners, or persons in charge of carts or wagons who do not lease space and market room in said markets, as herein provided for, shall be subject to all the provisions of existing ordinances, and shall have all the rights now secured to them by section 26 of Ordinance No. 4,155, as it originally reads." The article read originally as follows: "Sec. 26. That each and every cart or wagon for the conveyance of vegetables to the public markets of this city shall have the right to back up to the banquettes alongside of said market; provided, however, that between the hours of seven o'clock a. m. and 2 o'clock p. m., they shall not be permitted to make sales therefrom, may deliver goods previously sold to occupants of stalls or stands during any hour, and no market fees or dues shall be collected from said wagons; and provided, further, that in taking their position they be separated at least three feet, in order to allow pedestrians to cross from one side of the street to the other; and that any violation of the above shall subject the offender to the penalties stipulated in section 32 of this ordinance." Defendant filed an exception to the complaint, submitting to the court that all proceedings against him should be stayed and quashed, and the affidavit made be decreed null and void, illegal, and wholly defective, on which no prosecution can be had, for the reasons that same is vague, and does not specifically charge the accused of what part or parts of the Ordinance No. 4,155, § 26, and amended by Ordinance No. 12,632, Council Series, he is accused and to be tried for; that said section No. 26 of Ordinance No. 4,155, as amended by Ordinance No. 12,632, embraces a number of separate and distinct provisions and requirements, and the accused should be informed which of them, or which one of them, he is charged

to have violated. The exception was overruled. Defendant, under reservation of the exception, answered. He pleaded that he was not guilty of any matter provided for in section 26, as amended, which he averred was absolutely illegal, null, and void, and unconstitutional, for the reasons assigned by him. He averred: That he was engaged in the business of truck farming, or raising vegetables for daily consumption, and in the necessary management of his business brings the same, according to usage and custom, which has prevailed in this city immemorially to the public markets for sale to the retailers and persons having stalls in said markets, where they sell at retail prices to daily consumers. That he is informed and believes that the only portion of said pretended ordinance and ordinances which he was charged with having violated was the proviso that owners or persons in charge of carts or wagons shall lease space and market room not less than 12½ feet in area in said markets, and pay to the commissioner of police and public buildings through his inspector, collector, or collectors, or the lessee or lessees, or his or their collector or collectors, for the space and market room so leased, both, at the rate of two cents per day for each and every square foot of space or market room leased, etc. That, in so far as this ordinance under which he was attempted to be prosecuted imposes a payment of this sum per day as a condition precedent to his right to sell at wholesale or retail, to consumers or others, the product of his own labor, it was absolutely null, void, and unconstitutional, for the reason that he could not be subjected for the purpose, as a condition precedent to his right to sell the products of his own labor by the payment of any tax or license. That said ordinance in this regard purported and attempted to impose a tax or license for revenue, and that, whether it be such tax or license for revenue, it was absolutely null, void, and unconstitutional; and, further, said ordinance should have been held, in this regard, illegal, null, and void, as absolutely unreasonable, inequitable, unjust, and oppressive on its face. That market space or area is for the benefit

of the public, except that actually covered by stalls; and the pretense of making him, for the privilege of backing his cart against the banquettes around the markets, rent a certain space of area at the rate of two cents per square foot was absurd, preposterous, and unreasonable on its face, wholly *ultra vires* on the part of the city of New Orleans, and null and void, for this reason, as well as for the reason that, if said exaction was intended as a tax or license for revenue, it was illegal and unconstitutional for want of power on the part of the city of New Orleans to impose it. In view of the premises he prayed that his exception be maintained; that said section 26 of said ordinance and the amendment thereto be decreed illegal, null, and void, and unconstitutional.

In the brief filed on behalf of the city it is said, upon the authority of State *v.* Dunbar, 43 La. Ann. 836, 9 South. 492, and State *v.* Baker, 44 La. Ann. 79, 10 South. 405, that "the precision required in indictments for crime before courts of record is not applicable to affidavits against violators of municipal ordinances before recorder's court." That is true, but we have nowhere said that an affidavit charging a certain person simply with having violated a particular ordinance, and giving merely the number of the same, comes up to the requirements of the law. An affidavit of that particular kind seems to be the one now generally adopted before the recorders of the city of New Orleans. We take this occasion to say that an affidavit so worded is grossly insufficient, and the recorders should insist upon a more definite one. The complaint should state wherein and in respect to what the particular ordinance has been violated. The constitution of the state authorizes all parties threatened with a fine under an ordinance to appeal to the supreme court when the legality or constitutionality of the fine has been urged in the recorder's court by the defendant. Where that defense has been set up, and defendant has appealed from an adverse judgment, the record should be in a situation to enable this court to ascertain whether appellant is so situated as to entitle him to raise that particular defense. An ordinance may be to

some extent illegal or unconstitutional, and to some extent legal. If the legal portion would have justified a charge against and a judgment against defendant, he would have had no concern whether the other parts of the ordinance should be legal or not. State *v.* Riley, 49 La. Ann. 1618, 22 South. 843. If, however, the illegal portion should have been precisely that upon the strength of which the judgment had been rendered, the appellate court, not knowing upon what branch of the ordinance the judgment had been based, would assume, to defendant's irreparable injury, that it was justified by the law and the facts. In the case at bar the admissions of parties and the judgment of the court have brought us to a knowledge of the legal situation. It was admitted that defendant is a gardener; that, having a cart with vegetables, he was stationed in a place where, if the ordinance was legal, he should have paid the fee. It was further admitted that he did not pay, but had refused to pay, the same, upon the grounds stated in the demurrer. The recorder found as a fact that he had sold at retail, and refused to pay the fee provided for by the ordinance. The matter before us is the legality of the judgment appealed from rendered upon this state of facts.

The action we are dealing with is not one seeking to recover the fee or license or tax from the defendant. He has not paid, and the city is not attempting to force him to do so. As matters stand, defendant, owner of a cart for the conveyance of vegetables to the public market, has backed the same up to the banquette around the market, and sold goods from such wagon at retail. He was prohibited from doing so by section 26 of Ordinance No. 4,155. Was the city council authorized to pass this particular ordinance? We think it was, for the reasons assigned by this court in State *v.* Sarradat, 46 La. Ann. 700, 15 South. 87, 24 L. R. A. 584. The city having established a public market, and leased the same to parties who had paid it a large amount for the market privilege, it was its duty and its right to protect its lessee in the premises. The

City Market—Power to Prohibit Sales Elsewhere.

ordinance was an auxiliary ordinance for that purpose. As said in Morano *v.* Mayor, 2 La. 219: "No one would rent a stall to sell meat in the market house, or any of those stands, if butcher's meat or oysters could be sold in a temporary stall, near the market house or elsewhere, or sell oysters at any other stand." But appellant says that the original section 26 has been amended, and gardeners are now permitted to sell from their carts each day, provided they lease each day a certain space in the market at a rate fixed, and pay the same to the commissioner of police and public buildings, or the market lessees, or their collector; and the city council is without authority to force him to lease such space and pay for the same. There is no obligation imposed by the city on defendant to lease a space in the market, or to pay for the same. He is perfectly at liberty, under the original ordinance, to back his cart up to the banquette, and deliver his produce to the occupants of stalls to whom he had previously sold it, without payment of any sum to any person. He is under no obligation to make sales from his wagon at the banquette. If he does so, it is a matter of pure chance on his part. If the city has the right to absolutely prohibit the making of sales from carts at the banquette, defendant cannot complain that an absolute prohibition should have been changed into a conditional permission, unless such conditional permission should work a discrimination between parties similarly circumstanced. We do not perceive, in the ordinance complained of, that a special right or privilege has been given to any one. We think the object of this conditional permission is obvious. As the purpose of the absolute prohibition was the protection by the city of its lessee from sales made from wagons at the banquette, to the prejudice of his rights under the lease, it was competent for the city, with his consent, to have either repealed the prohibition altogether, or to modify it to an extent which he might deem consistent with that protection, provided all outside parties should be placed upon an equality. It is apparent that the lessee has consented that sales

Same—Privileges—Compulsory Taxation.

Notes

should be made from the wagons on condition of the parties selling from the wagons being placed in the same position which they would occupy if they each occupied a stall inside the market. The space referred to as that which the wagon owner is to lease is evidently that covered by a stall, and the price to be paid daily is that chargeable for a stall. If the market would be able to draw pay from the wagons corresponding to the same number of additional stalls, his reasons for objections to sales from the wagons would disappear. The only parties who would have cause to complain of this state of affairs would seem to be the lessees of actual stalls inside the market by the increased number of sellers of produce. We do not see that defendant is injured in any way by the change. He says he has been illegally condemned to pay a fine for not paying the fee demanded of him, but we think there is error in this. It is true that the recorder has found the defendant guilty of selling at retail without paying the fee provided for in the city ordinance, and it is true, also, that, if he had paid the fee, there would doubtless have been no charge brought against him; but the actual fact is none the less that he has been condemned for illegally selling vegetables at retail from his wagon backed up against the market banquette. There is no coercion brought against him through this proceeding to make him pay the fee; only coercion to make him desist from selling at retail from his wagon. Should there be any coercion towards making him pay a daily fee or rent, it would only be by way of indirect consequence or result, and an election to pay, rather than to desist from making sales. In one sense this may be said to be compulsory,—that is to say, unwillingly done by him,—but in no sense can it be said that he was coerced by the ordinance into either making sales or paying for market space. We are of the opinion there is no error in the judgment, and it is hereby affirmed.

NOTES.

Markets—Power of Municipality to Prohibit Sales Elsewhere.—It has been held that a municipal corporation under its power to regu-

late markets may prohibit the sale of marketable articles elsewhere. *Ex parte* Canto, 21 Tex. App. 51, 57 Am. Rep. 609; State *v.* Namias, 49 La. Ann. 618, 21 So. Rep. 852; Bush *v.* Seabury, 8 Johns (Eng.) 418; Dunham *v.* Rochester, 5 Cow. 462. In Keck *v.* Cincinnati (C. P.), 6 Ohio Dec. 97 it was held that a municipal corporation having authority to establish and regulate markets can prohibit under penalty the sale of fresh meats at retail, at any other place on the sidewalk or in the streets set apart as market places.

But the decisions on this subject are not in harmony. See Bethune *v.* Hughes, 28 Ga. 560, 73 Am. Dec. 789; Caldwell *v.* Alton, 33 Ill. 416, 85 Am. Dec. 283; Bloomington *v.* Wall, 46 Ill. 489; St. Paul *v.* Laidler, 2 Minn. 190.

In Caldwell *v.* City of Alton, *supra*, it was held that a municipal corporation cannot, under the power to regulate a market, restrain a regular merchant from selling vegetables at his store.

Power of Municipality to Prevent Hucksters from Selling on Streets.—See State *v.* City of Cape May, 2 Mun. Corp. Cas. 717, and *notes*, 723 *et seq.*

Town of Johnson City

v.

Wolfe *et al.*

(*Supreme Court of Tennessee, Sept. 29, 1899.*)

Torts of Policemen—Liability of Municipalities.*—A municipality may be liable for a trespass committed by its policeman, where the act was authorized by its authorities.

Streets — Implied Dedication — Married Women — Estoppel. — Although in the case of a married woman a stronger case must be made out than if she was discovert, to induce a court to apply to her the rule of implied dedication of land to a public use, the doctrine of estoppel *in pais* may be invoked against.

Same—Same.†—Where a fence erected on property abutting upon the street of a municipality is set back on a line with the other fences

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*See generally City of Omaha *v.* Croft *et al.*, *ante* 172, and *notes*, 182 *et seq.*

A municipal corporation is not liable for the torts of police officers, done in and about the performance of their police duty. See Craig *v.* City of Charleston, 2 Mun. Corp. Cas. 139, and *note*, 141 *et seq.*

†See notes at end of case.

Town of Johnson City *v.* Wolfe

by the husband of the abutting owner, and she allows it to remain set back for eight years, and allows the strip of land between the old and new fence line to be used by the public as a part of the street or sidewalk, without objecting, such acquiescence by her amounts to a dedication of such strip to the public use, even though she did not authorize or consent to such setting back of the fence at the time it was accomplished; as no specific duration of time is essential to establish such a dedication of land.

ERROR by defendant to Johnson City law court. *Reversed.*

Robt. Burrow and *S. E. Miller*, for plaintiff in error.
A. R. Johnson and *E. C. Reeves*, for defendants in error.

BEARD, J. This is an action of trespass brought by the defendants in error to recover damages for injuries sustained by Mrs. Wolfe in the tearing down of her fence and the destruction of the shrubbery on her lot. There was a verdict for $250. The record shows that the wrong complained of was done by a policeman of plaintiff in error, and it is insisted that this was a personal tort of the wrongdoer, for which the municipality is not liable. The rule of law here invoked is well settled. Conelly *v.* City of Nashville, 100 Tenn. 262, 46 S. W. 565; Irvine *v.* Mayor, etc., of Chattanooga, 101 Tenn. 291, 47 S. W. 419. But the difficulty which plaintiff in error encounters is that, while the testimony is that the fence was torn down and thrown upon the shrubbery growing on the lot of Mrs. Wolfe by the policeman, yet there is enough in the statement of the witnesses, as found in the bill of exceptions, to warrant the jury in making the inference that this action was done with the sanction of the authorities of the corporation. This being so, the plaintiff in error is not in a position to avail itself of this rule of law, especially as evidently it is invoked for the first time in this court. It is proper to add that the act of the recorder of this corporation in causing the husband of Mrs. Wolfe to be arrested, and amercing him with a fine, for setting this fence back in the place from which it had been torn by the police officer, could not of itself be held to ratify the alleged wrongful act,

Case Stated.

Torts of Policemen—Liability of Municipalities.

so as to make it the act of the municipality. Pesterfield *v.* Vickers, 3 Cold. 205.

The real ground upon which this case was defended in the court below is that the fence, when taken down, was standing on a strip of ground which had been, by implication, dedicated by Mrs. Wolfe to the public as a part of the street, and which had been accepted and improved as such by the corporation, and which for many years was used by the public as a portion of the street. If such are the facts, the law is that this dedication was irrevocable by the owner (Ruch *v.* Rock Island, 5 Biss. 95, Fed. Cas. No. 12,105), and that the town authorities had a right to remove the fence, as an obstruction (Elliott, Roads & S. 491, 492; Beach, Pub. Corp. § 1235). The facts bearing upon dedication, as disclosed in the record, are as follows: The lot of which the strip in controversy formed a part fronted on Maple street, at the point of its intersection with Spring street, in Johnson City. Several years before the wrong complained of, an effort was made by many lot owners on Maple street to have it widened by a donation of a strip on each side of 10 feet. All these owners on the side on which Mrs. Wolfe's property lies agreed to this, except herself. The objection on her part defeated this original plan, but, about eight years or more before the institution of this suit, Mr. Wolfe did move back the fence which stood along the front of his wife's lot some 4½ feet. At the time of this removal the fence was an ordinary wooden or paling one. Afterwards there was erected by him in its place an iron fence, of a valuable and permanent character. When this was done other lot owners on Maple street aligned on the fence of the Wolfes, and the municipal authorities, assuming, as is clearly inferable from the evidence, that it was the intention of the parties to dedicate this open strip to the public, graded it up to the line of the fence, and made gutters, and treated it as a part of the street. Not only that, but stepping-stones on a line with this strip in front of the Wolfe property, and extending across Spring street, were laid down; and for eight years the public, with-

out interruption, had used the strip as a part of the street, and also the crossing thus connected with it. This use was for the first time interfered with when the plaintiff's moved their fence out, and once more took within its inclosure the strip in controversy. With regard to the original act of setting the fence back so as to throw out this strip, Mrs. Wolfe says it was done by her husband without her consent, but she adds that she did not object to the public using it as a part of the street or sidewalk, and that she knew of its use during all the years it was thus outside, and was also aware that the authorities of the town had caused to be constructed the crossing already referred to, and of its extension from this strip. Mr. Wolfe corroborates this testimony of his wife. On the subject of implied dedication, the law is well settled that, so far as the owner of the property is concerned, it is a question of intention,—not an intent which is kept concealed in the mind, but that which is manifest in the visible conduct and open acts of the owner. Elliott, Roads & S. p. 92. The true rule is clearly stated by Mr. Elliott on page 92 of the work just referred to, in the following terms: "The public as well as individuals have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation." And we think, while it is true that in the case of a married woman a stronger case must be made out than if she was discovert, to induce the court to apply the rule of implied dedication to her, yet, when a case is made in favor of the public, the doctrine of estoppel *in pais* may be invoked against her. In such a case she is held bound because it would be a fraud upon the rights of others to permit her to gainsay what she had done, and deprive others of rights they have acquired upon the faith of what her acts and declarations implied. *Id.* p. 103. This rule of estoppel *in pais* has

Streets—Implied Dedication—Married Women—Estoppel.

been applied by this court, in cases of private rights, to *femes covert*. Galbraith *v.* Lunsford, 87 Tenn. 89, 9 S. W. 365; Pilcher *v.* Smith, 2 Head, 208; Howell *v.* Hale, 5 Lea, 405. And, while ordinarily an easement that does not rest upon express grant can only be created after an adverse use of 20 years, yet in the matter of streets and highways a much less period of use by the public has been held sufficient. In the case of Rughby *v.* Merryweather, 11 East, 395, a period of eight years was held quite a sufficient time for presuming a dedication of the way to the public; and in a great case, which LORD KENYON said was much contested, six years was held sufficient. To the same effect are the cases of Reg. *v.* Petrie, 30 Eng. Law & Eq. 207, and Jarvis *v.* Dean, 3 Bing. 447. It is true that there are other English cases, and some American cases, holding that a much longer period is necessary to create the easement, yet the weight of authority, at least in this country, since the leading case of City of Cincinnati *v.* White's Lessee, decided by the supreme court of the United States in 1832, and reported in 6 Pet. 431, is that the right of the public to the street or highway dedicated by implication does not rest upon the length of time it is used. In formulating the propositions settled by this case, in volume 2, § 631, of his work on Municipal Corporations, JUDGE DILLON states the fifth and last of these propositions in these words: "No specific length of time to constitute a valid dedication. All that is required is the assent of the owner of the soil to the public use and the actual enjoyment by the public for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment." In view of this rule, and as applying to the issue in this case, the defendant was entitled to a submission to the jury of the following special request, which was declined by the trial judge, to wit: "If the fence of Mrs. Wolfe was set back on a line with other fences by her husband, and she allowed it to remain set back for eight

Same—Same.

years, and she allowed the strip of ground in question to be used by the public as a part of the street or sidewalk without objection on her part, said acquiescence by her would amount to a dedication of said strip of land to the public use; and this would be true although she did not authorize or consent to the setting back of the fence in the outset." For error in declining to give this request, the judgment must be reversed.

NOTES.

Dedication of Land to Public Inferred from User.—The presumption of the dedication of land to public use, and its acceptance by the public arises where it has been left uninclosed by the owner, and used by the public for a long time without objection on the part of the owner.

United States.—New Orleans *v.* United States, 10 Pet. 661, 722.

Alabama.—Smith *v.* Inge, 80 Ala. 283; Doe *v.* Jones, 11 Ala. 63; Hoole *v.* Attorney General, 22 Ala. 190.

California.—Eureka *v.* Croghan, 81 Cal. 524; People *v.* Reed, 81 Cal. 79; Schwerdtle *v.* Placer County, 108 Cal. 589; Wolfskill *v.* Los Angeles County, 86 Cal. 405.

Connecticut.—Green *v.* Canaan, 29 Conn. 157.

Illinois.—Macy *v.* Taylor, 19 Ill. 634; Grube *v.* Nicholas, 36 Ill. 93; Harding *v.* Hale, 61 Ill. 192; Manrose *v.* Parker, 90 Ill. 581; Lakeview *v.* LeBahn, 120 Ill. 92.

Indiana.—Faust *v.* Huntington, 91 Ind. 493; Green *v.* Elliott, 86 Ind. 53; Boyer *v.* State, 16 Ind. 451; Ross *v.* Thompson, 78 Ind. 90.

Iowa.—Pella *v.* Scholte, 24 Iowa 283; Onstott *v.* Murray, 22 Iowa 457; Shea *v.* Ottumwa, 67 Iowa 39; Bradstreet *v.* Dunham, 65 Iowa 248; Manderschild *v.* Dubuque, 29 Iowa 73, 4 Am. Rep. 196; Ducombe *v.* Powers, 75 Iowa 185; State *v.* Tucker, 36 Iowa 485; Waterloo *v.* Union Mill Co., 72 Iowa 437; Birmingham, 74 Iowa 407.

Kansas.—City Cem. Assoc. *v.* Meninger, 14 Kan. 312; Hayes *v.* Houke, 45 Kan. 466.

Kentucky.—Greenup County *v.* Maysville, etc., R. Co. (Ky.), 21 S. W. Rep. 351.

Louisiana.—Saulet *v.* New Orleans, 10 La. Ann. 81; David *v.* New Orleans, 16 La. Ann. 404, 79 Am. Dec. 586.

Massachusetts.—McKenna *v.* Boston, 131 Mass. 143.

Minnesota.—Kennedy *v.* Levan, 23 Minn. 513.

Mississippi.—Harrison County *v.* Seal, 66 Miss. 129; Briel *v.* Natchez, 48 Miss. 423.

Notes

Missouri.—Campbell *v.* Kansas City, 102 Mo. 326; Meiners *v.* St. Louis, 130 Mo. 274; Price *v.* Breckenridge, 92 Mo. 378; Gamble *v.* St. Louis, 12 Mo. 617; Kansas City Milling Co. *v.* Riley, 133 Mo. 574.

New Hampshire.—Stevens *v.* Nashua, 46 N. H. 192.

New York.—Holdane *v.* Coldspring Trustees, 21 N. Y. 474; People *v.* Loehfeln, 102 N. Y. 1; Cook *v.* Harris, 61 N. Y. 448; Hunter *v.* Sandy Hill Trs., 6 Hill (N. Y.) 480; McMannis *v.* Butler, 51 Barb. 436; Child *v.* Chappell, 9 N. Y. 255.

Ohio.—Winslow *v.* Fuhrman, 25 Ohio St. 639; Brown *v.* Manning, 6 Ohio 298, 28 Am. Dec. 255.

Oregon.—Carter *v.* Portland, 4 Oregon 339.

Pennsylvania.—Griffin's Appeal, 109 Pa. St. 150; Com. *v.* Moorehead, 118 Pa. St. 344, 4 Am. St. Rep. 599.

Tennessee.—Nashville, etc., R. Co. *v.* State, 1 Baxt. (Tenn.) 55; Scott *v.* State, 1 Sneed (Tenn.) 629.

Texas.—Lewis *v.* San Antonio, 7 Tex. 288.

Utah.—Wilson *v.* Hull, 7 Utah 90.

Vermont.—State *v.* Wilkerson, 2 Vt. 480; Fairfield *v.* Morey, 44 Vt. 239; Shanks *v.* Whitney, 66 Vt. 405.

Virginia.—Harris *v.* Com., 20 Gratt. 632; City of Richmond *v.* A. Y. Stokes & Co., 31 Gratt. 713.

Wisconsin.—Buchanan *v.* Curtis, 25 Wis. 99, 3 Am. Rep. 23; Weisbrod *v.* Chicago & N. W. Ry. Co., 18 Wis. 35; Eastland *v.* Fogo, 66 Wis. 133.

Same—Duration of User.—An intention to dedicate land and its acceptance by the public will be presumed, where the public assumes to appropriate the land for public use, and the owner interposes no objection to its continual use by the public for such a period that the public convenience may be materially affected by the interruption of such use. Such presumption, however, is not conclusive.

District of Columbia.—Lansburg *v.* District of Columbia, App. 8 (D. C.) 10.

California.—Helm *v.* McClure, 107 Cal. 199.

Colorado.—Denver *v.* Denver, etc., R. R. Co., 17 Colo. 583.

Connecticut.—Hartford *v.* New York, etc., R. R. Co., 59 Conn. 250; Noyes *v.* Ward, 19 Conn. 250.

Delaware.—State *v.* Reybold, 5 Harr. (Del.) 484.

Georgia.—Macon *v.* Franklin, 12 Ga. 239.

Illinois.—Hiner *v.* Jeanpert, 65 Ill. 428; Dimon *v.* People, 17 Ill. 416; Edwardsville *v.* Barnsback, 66 Ill. App. 381; Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264.

Indiana.—Campbell *v.* O'Brien, 75 Ind. 222; Debolt *v.* Carter, 31 Ind. 355; Carr. *v.* Kold, 99 Ind. 53; Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; State *v.* Hill, 10 Ind. 219; Ross *v.* Thomp-

Notes

son, 78 Ind. 90; Evansville *v.* Evans, 37 Ind. 229; Hays *v.* State, 8 Ind. 425; Summers *v.* State, 51 Ind. 201; Holcraft *v.* King, 25 Ind. 352; Lake Erie, etc., R. Co. *v.* Boswell, 137 Ind. 336.

Iowa.—State *v.* Tucker, 36 Iowa 485, 487; Gerberling *v.* Wunnenberg, 51 Iowa 125; Gear *v.* Chicago, etc., R. Co., 39 Iowa 23; Fisher *v.* Beard, 32 Iowa 346; Hougham *v.* Harvey, 33 Iowa 203.

Kentucky.—Eastern Cemetery Co. *v.* Louisville (Ky.), 15 S. W. Rep. 1117.

Massachusetts.—Abbott *v.* Cottage City, 143 Mass. 521.

Michigan.—Nivhols *v.* New England Furniture Co., 100 Mich. 230.

Minnesota.—Case *v.* Favier, 12 Minn. 89; Brakken *v.* Minneapolis, etc., Ry. Co., 29 Minn. 41.

Mississippi.—New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374.

Missouri.—Stacey *v.* Miller, 14 Mo. 478, 55 Am. Dec. 112; Kansas City, etc., Co. *v.* Riley, 133 Mo. 574.

Nebraska.—Rube *v.* Sullivan, 23 Neb. 779.

New Hampshire.—Pritchard *v.* Atkinson, 4 N. H. 9.

New Jersey.—New York, etc., R. Co. *v.* South Amboy, 57 N. J. L. 252; State *v.* Jersey City, 40 N. J. L. 483; Central R. Co. *v.* State, 32 N. J. L. 220.

New York.—Corning *v.* Head, 86 Hun 12; Bissell *v.* New York, etc., R. R. Co., 26 Barb. 630; Hunter *v.* Sandy Hill, 6 Hill (N. Y.) 413; Cook *v.* Harris, 61 N. Y. 448; Cady *v.* Conger, 19 N. Y. 256; Ward *v.* Davis, 3 Sandf. (N. Y.) 502.

North Carolina.—Crump *v.* Mims, 64 N. Car. 767; State *v.* Marble, 4 Ired. L. (26 N. Car.) 318.

Ohio.—Alvord *v.* Richmond (C. P.) 3 Ohio N. P. 136, 1 Ohio L. D. 177; Penquite *v.* Lawrence, 11 Ohio St. 274.

Pennsylvania.—Schenley *v.* Con., 36 Pa. St. 29, 78 Am. Dec. 359; Pittsburg, etc., R. Co. *v.* Dunn, 56 Pa. St. 280.

Rhode Island.—Hughes *v.* Providence, etc., R. Co., 2 R. I. 493.

Utah.—Whittaker *v.* Ferguson (Utah 1898), 51 Pac. Rep. 980.

Vermont.—Abbott *v.* Mills, 3 Vt. 521, 23 Am. Dec. 222; State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554; Morse *v.* Ranno, 32 Vt. 600; State *v.* Catlin, 3 Vt. 530, 23 Am. Dec. 230.

West Virginia.—Taylor *v.* Philippi, 35 W. Va. 554.

Wisconsin.—Witter *v.* Damitiz, 81 Wis. 385; Connehan *v.* Ford, 9 Wis. 240.

England.—Rughby Charity *v.* Merryweather, 11 East 376; North London R. Co. *v.* St. Mary, 27 L. T. 672; Grand Surrey Canal Co. *v.* Hall, 1. M. & G. 392, 39 E. C. L. 497; Reg. *v.* Petrie, 4 El. & Bl. 737, 82 E. C. L. 737.

Canada.—Guy *v.* Montreal, 3 Leg. N. 402, 25 L. C. J. R. 132.

WOOD *et al.*

v.

CITY OF HAVERHILL *et al.*

(*Supreme Court of Massachusetts, Nov. 29, 1899.*)

Authority to Grant Vacations to Policemen.—Where it can be done without subjecting the municipality to additional expense, the municipal authorities, without being expressly authorized, may grant reasonable vacations to policemen.

APPEAL by plaintiffs from Essex county superior court. *Bill dismissed.*

M. A. Pingree and *J. A. Ryan*, for appellants.

F. A. Newell and *De Courcy & Coulson*, for appellees.

MORTON, J. A reasonable vacation, without thereby subjecting the city to additional expense, might well have been regarded by the city council as calculated to promote the health and efficiency of the police force, and, if so, we think that it was within the power of the city council to adopt the order which it did. It would come fairly within the authority conferred on cities and towns to make such reasonable provisions, as they should deem conducive to their welfare, "for directing and managing the prudential affairs, preserving the peace and good order, and maintaing the internal police thereof." Pub. St. c. 27, § 15; *Id.* c. 28, § 2. It would also come within the power conferred on the mayor and aldermen of Haverhill to make such regulations for the government of the police department, not inconsistent with law, as they deem proper. St. 1894, c. 480; Malcolm *v.* City of Boston, 173 Mass. 312, 53 N. E. 812. Bill dismissed.

ATTORNEY GENERAL

v.

WILLIAMS *et al.*

(*Supreme Judicial Court of Massachusetts, Oct. 30, 1899.*)

Limiting Heights of Buildings near Public Park—Eminent Domain—Constitutionality of Statute.—A statute may be passed limiting the height to which buildings, adjacent to a public park within the limits of the capital city of the state, may be completed, built, rebuilt or altered, for the purpose of promoting the beauty and attractiveness of the park, and to prevent unreasonable encroachments upon its light and air, and making ample provision for compensation to the owners of such adjacent property, the statute being in all respects in accordance with the laws regulating the taking of property by right of eminent domain.

Same—Same—Power to Require City to Make Compensation.*—The city could be required to make such compensation to the adjacent property owners.

Same—Effect of Approval of Building by Municipal Officers.—Under such a statute the park commissioners of the city were only authorized to approve sculptured ornaments surmounting a 90-foot building, but they undertook to approve the ornamentation of the cornice of two of the four walls of a 96-foot building. *Held*, that in reference to the building proper, as distinguished from such ornamentation on the face of two of its walls, the owner of the building could derive no advantage from such approval.

Same—Enforcement of Statute.—A suit in equity to enforce such a statute can be maintained by the attorney general, as the statute gives rights in the nature of an easement over the lands facing and adjacent to the park, which easement is annexed to the park for the benefit of the public.

Same—Same.—St. 1898 of Massachusetts, c. 452, was not intended to create rights enforceable only under St. 1894, c. 257, but creates rights enforceable under general laws.

REPORT from Suffolk county supreme judicial court. *Demurrer and pleas overruled.*

*See note at end of case.

Attorney General *v.* Williams

Elder, Waite & Whitman, for plaintiff.
A. E. Pillsbury, for defendants.

KNOWLTON, J. This is an information by the attorney general to prevent the erection and maintneance of that portion of a building on Copley Square, in the city of Boston, which is above the limit of height prescribed by St. 1898, c. 452. Section 1 of this statute is as follows: "Any building now being built, or hereafter to be built, rebuilt or altered in the city of Boston upon any land abutting on Saint James avenue between Claredon street and Dartmouth street, or upon the land at the corner of Dartmouth street and Huntington avenue, now occupied by the Pierce Building, so called, or upon land abutting upon Dartmouth street, now occupied by the Boston Public Library Building, or upon land at the corner of Dartmouth street and Boylston street now occupied by the New Old South Church Building, may be completed, built, rebuilt or altered to the height of ninety feet and no more; and upon any land or lands abutting on Boylston street between Dartmouth street and Claredon street may be completed, built, rebuilt or altered to the height of one hundred feet and no more: provided however that there may be erected on any such building above the limits hereinbefore prescribed, such suitable towers, domes, sculptured ornaments and chimneys as the board of park commissioners of said city may approve." Section 2 repeals St. 1896, c. 313, and St. 1897, c. 379, so far as they limit the height of buildings erected along the line of streets, parks ways, or boulevards bordering on public parks; section 3 provides for the payment of damages to any person owning or having an interest in an uncompleted building begun before the 14th day of January, 1898, which is affected by the act; and section 4 provides for compensation to all persons sustaining damages to their property by reason of the limitation of the height of buildings prescribed by the act. The case is reported upon the information, demurrer, pleas, and certain facts found at the hearing on the pleas. Case Stated.

The first question raised by the report is whether the stat-

ute is constitutional. The streets mentioned in the statute are adjacent to Copley Square. On the case as now presented, we must assume that Copley Square, in the language of the information, "is an open square and a public park, intended for the use, benefit, and health of the public, and is surrounded by buildings devoted to religious, charitable, and educational purposes, some of which contain books, manuscripts, and works of art of great value, many of which are in their nature irreplaceable." Regulationss in regard to the height and mode of construction of buildings in cities are often made by legislative enactments, in the exercise of the police power, for the safety, comfort, and convenience of the people, and for the benefit of property owners generally. The right to make such regulations is too well established to be questioned. Salem *v.* Maynes, 123 Mass. 372; Inhabitants of Watertown *v.* Mayo, 109 Mass. 315; Sawyer *v.* Davis, 136 Mass. 239. See Talbot *v.* Hudson, 16 Gray, 417. In view of the kind of buildings erected on the streets about Copley Square, and the uses to which some of these buildings are put, it would be hard to say that this statute might not have been passed in the exercise of the police power, as other statutes regulating the erection of buildings in cities are commonly passed. But it differs from most statutes relative to this subject, in providing compensation to persons injured in their property by the limitations which it creates. In this respect it conforms to the constitutional requirements for the taking of property by the right of eminent domain. Looking to all its provisions in connection with the place to which they apply, it seems to have been intended as a taking of rights in property for the benefit of the public who use Copley Square. It adds to the public park rights in light and air, and in the view over adjacent land above the line to which buildings may be erected. These rights are in the nature of an easement created by the statute and annexed to the park. Ample provision is made for compensation to the owners of the servient

Limiting Heights of Buildings near Public Park—Eminent Domain—Constitutionality of Statute.

estates. In all respects the statute is in accordance with the laws regulating the taking of property by right of eminent domain, if the legislature properly could determine that the preservation or improvement of the park in this particular was for a public use. The uses which should be deemed public in reference to the right of the legislature to compel and individual to part with his property for a compensation, and to authorize or direct taxation to pay for it, are being enlarged and extended with the progress of the people in education and refinement. Many things which a century ago were luxuries, or were altogether unknown, have now become necessaries. It is only within a few years that lands have been taken in this country for public parks. Now the right to take land for this purpose is generally recognized and frequently exercised. Foster *v.* Commissioners, 133 Mass. 321; Shoemaker *v.* U. S., 147 U. S. 282, 13 Sup. Ct. 361. Many statutes have been passed in this commonwealth allowing taxation for purposes affecting the health, comfort, pleasure, and recreation of the people, and thus conducing to their welfare. In Kingman *v.* City of Brockton, 153 Mass. 255, 26 N. E. 998, the court said, referring to a statute authorizing the raising of money by taxation for the erection of a memorial hall: "The statute * * * may be vindicated on the same ground as statutes authorizing the raising of money for monuments, statutes, gates, or arches, celebrations, publication of town histories, parks, roads leading to points of fine scenery, decorations upon public buildings, or other public ornaments or embellishments designed merely to promote the general welfare, either by providing for fresh air, a public recreation, or by educating the public taste, or enforceing sentiments of patriotism or respect for the memory of worthy individuals. The reasonable use of public money for such purposes has been sanctioned by several different statutes, and the constitutional right of the legislature to pass such statutes rests upon sound principles." See, also, Higginson *v.* Inhabitants of Nahant, 11 Allen, 530, and Hubbard *v.* Taunton, 140 Mass.

467, 5 N. E. 157. In Olmstead *v.* Camp, 33 Conn. 551, the court, in discussing the line between public and private uses, says: "From the nature of the case, there can be no precise line. The power requires a degree of elasticity, to be capable of meeting new conditions and improvements and the ever-increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and, in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the court." The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to minister, not only to the grosser senses, but also to the love of the beautiful in nature, in the varied forms which the change in seasons brings. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting, and, in the highest sense, educational. If wisely planned and properly cared for, they promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care and adornment of them, to make them beautiful and enjoyable. Their æsthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park do not always justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed, and whose love of beauty is being cultivated. We have already quoted from the information the language in regard to the surroundings of the square. The Counsel on both sides referred in argument to the well-known buildings which constitute these surroundings. Trinity Church, the Museum of Fine Arts, the Boston Public Library, the New Old South Church, the Second Church of Boston, and the buildings of the Massachusetts Institute of Technology all face the beholder who stands on Copley Square and looks around

him. Some of these buildings are public in the ordinary sense of the word, and some of the corporations which own them have been beneficiaries of the commonwealth on account of their *quasi* public character, and the public certainly feels an interest in them. It is argued by the defendants that the legislature, in passing this statute, was seeking to preserve the architectural symmetry of Copley Square. If this is a fact, and if the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land against the will of the owner. But if the legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the lawmaking power might not determine that this was a matter of such public interest as to call for an expenditure of public money, and to justify the taking of private property. While such a determination should not be made without careful consideration, and while the growing tendency towards an enlargement of the field of public expenditure should be jealously watched and carefully held in check, a determination of this kind, once made by the legislature, cannot be lightly set aside.

Same—Same—Power to Require City to Make Compensation.

It is contended that, if the legislature could take this right for the use of the public, it could not require the city of Boston to make compensation for it, but should have provided for the payment of damages from the treasury of the commonwealth. This contention would limit too strictly the power of the legislature in the distribution of public burdens. Very wide discretion is left with the lawmaking power in this particular. The legislature may change the political subdivisions of the commonwealth by creating, changing, or abolishing particular cities, towns, or counties. It may require any of them to bear such share of the public burdens as it deems just and equitable. This right has been exercised in a great variety of ways. *In re* Kingman, 153 Mass. 566, 27 N. E. 778, and

cases and statutes there cited. It does not depend upon the clause of the constitution which authorizes the imposition of taxes, but upon the more general provisions defining the power of the legislature. While the interest to which this statute looks is public, it is largely local. A very large part of the public who are affected by the statute are citizens of Boston. The valuation of Boston is a large proportion of the valuation of the whole commonwealth. The legislature might well put the whole of this public burden upon the city of Boston.

Same—Effect of Approval of Building by Municipal Officers.

It appears that on October 31, 1898, the board of park commissioners voted "that the sculptured ornaments erected on the building * * * above the height of ninety feet, as shown in the plans thereof submitted to the board and in the building as now erected," be approved. The building is rectangular, and the height of its walls to the roof is 96 feet. The ceilings of the rooms in the upper story are a few inches above a horizontal line of the height of 90 feet. Above these rooms there is an open air space extending to the roof, a distance of about 4 feet, measured on the inside of the outer walls of the building. The walls of the building are of brick, and on the two sides fronting on the streets there is an ornamental facing of terra cotta, partly in relief, and extending from a line 90 feet in height upward to the roof, constituting the architrave, frieze, and cornice of the building, which are referred to in the vote of the park commissioners as "sculptured ornaments." On the other two sides of the building the walls of a corresponding height are of plain brick. The question arises whether the approval of these ornaments by the park commissioners relieves the building from the prohibition of the statute. It seems to us very clear that it does not. The prohibition against erecting a building above the height of 90 feet is absolute, except that certain erections, which are usually above the substantial parts of a building, may, with the approval of the park commissioners, be put "on any such building" above that height. These are

"steeples, towers, domes, sculptured ornaments, and chimneys." It is only as these become a part of the building by their erection upon it that any part of the building can be built to a greater height than 90 feet. All other parts of the building are left within the prohibition. But the ornaments put upon this building are not "erected on" a building constructed within the limits prescribed for it. We have a building with its solid brick walls extending 6 feet above the prescribed limit, and its roof at the top, and an inclosure within. The park commissioners, by their approval of certain sculptured ornaments on the face of the wall on two sides of the building, did not assume to approve of other parts of the building which constitute the solid structure; and the statute gave them no authority to approve of other parts of it, or of the building as a whole. The statute intended that the main structure of the building should not extend above the prescribed line, and that only the specified parts which should project above the building proper might, if approved, be erected on the building. It does not even permit roofs to be built above the line, as did the statute of 1897, c. 378, which it repeals. What the park commissioners were authorized to do was to approve sculptured ornaments surmounting a 90-foot building. What they have done is to approve the ornamentation of the architrave, frieze, or cornice of two of the four walls of a 96-foot building, leaving the other two walls, unornamented, 96 feet in height. In reference to the building proper, as distinguished from the ornamentation on the face of two of its walls, the defendant can derive no advantage from the vote of the park commissioners.

It is contended by the defendants that the attorney general cannot maintain a suit in equity to enforce this statute. His right depends upon the construction put upon the statute. We hold that the statute gives rights in the nature of an easement over lands facing Copley Square, which easement is annexed to the square for the benefit of the public for whose use and enjoyment Copley Square was laid out, and that these

Same—Enforcement of Statute.

rights are similar in their nature to rights in highways, in great ponds, and in the navigable waters of the commonwealth. For a deprivation of such public rights, an individual, unless he has suffered damages different in kind from those to the public generally, cannot maintain an action. The attorney general, as a public officer, represents the public, and may bring all proper suits to protect their rights. The wrong alleged in the present case, if permitted, would work a permanent injury to the public, depriving them of that which the statute gives them. It is a purpresture which, while not in a strict and narrow sense a public nuisance, is in the nature of a public nuisance, is sometimes called a public nuisance, and in equity is to be dealt with as a public nuisance. Com. *v.* Wilkinson, 16 Pick. 175; Attorney General *v.* Boston Wharf Co., 12 Gray, 553; Jenks *v.* Williams, 115 Mass. 217; Attorney General *v.* Woods, 108 Mass. 436; Same *v.* Old Colony R. Co., 160 Mass. 62, 35 N. E. 252; People *v.* Vanderbilt, 26 N. Y. 287. In regard to the enforcement of rights given to the public and to other land owners in lands reserved for their use by the commonwealth, see Attorney General *v.* Algonquin Club, 153 Mass. 447–454, 27 N. E. 2; Same *v.* Gardiner, 117 Mass. 492–499; Same *v.* Williams, 140 Mass. 329–331, 2 N. E. 80, and 3 N. E. 214. In England it is held that "the attorney general has a right to represent the public, either in equity or by prosecution at law, and in cases where the public interests are exposed to danger or mischief." Attorney General *v.* Birmingham & O. J. Ry. Co., 3 Macn. & G. 453; Same *v.* Mid-Kent Ry. Co., 3 Ch. App. 100; Same *v.* Shrewsbury Bridge Co., 21 Ch. Div. 752; Same *v.* Cockermouth Local Board, L. R. 18 Eq. 172. In Attorney General *v.* Jamaica Pond Aqueduct Corp., 133 Mass. 361–364, it was said, in reference to a great pond, that, "where an aqueduct corporation proceeds to draw off water to such an extent as to injure or endanger the rights of the public therein, an information in equity would furnish the only adequate means of asserting and protecting the rights of the

government and the public." The case of Attorney General *v.* Abbott, 154 Mass. 323, 28 N. E. 346, under facts very similar to those of the present case, sustains the right of the attorney general to maintain an information in equity for the protection of public rights in land dedicated to the use of the public as a park. Of similar purport is Attorney General *v.* Tarr, 148 Mass. 309–314, 19 N. E. 358. His right in Attorney General *v.* Revere Copper Co., 152 Mass. 444, 25 N. E. 605,—a similar case,—was assumed. See, also, Attorney General *v.* Consumers' Gas Co., 142 Mass. 417, 8 N. E. 138; Same *v.* Metropolitan R. Co., 125 Mass. 515. We are of opinion that the attorney general is the proper party, and that an information in equity is the proper form of proceeding for the enforcement of public rights against encroachments like those threatened in the present case.

There remains to be considered one other objection to the right of the attorney general to maintain this suit. It is argued that by the statute of 1894, c. 257, the city of Boston is given the right to enforce its building laws, that this remedy excludes all others, and that it applies to violations of the statute of 1898, c. 452. It is true that, when a statute provides a remedy for violations of it, the remedy is generally exclusive; but, if it provides no remedy, relief from wrongs against it is to be sought at common law. Turnpike Corp. *v.* Gould, 6 Mass. 40–44; Wiley *v.* Yale, 1 Metc. (Mass.) 553; Elder *v.* Bemis, 2 Metc. (Mass.) 599–604; U. S. *v.* Laescki (D. C.) 29 Fed. 699, and cases cited. St. 1894, c. 257, is as follows: "The supreme judicial court, or any justice thereof, and the superior court or any justice thereof, in term time or vacation, shall, on the application of the city of Boston by its attorney, have jurisdiction in equity to enforce or prevent the violation of provisions of the acts relating to the erection or alteration of buildings or other structures in the city of Boston, and may on such application restrain the erection, alteration, use or occupation of any such building or structure which is being, Same—Same.

Note

or has been erected or altered in violation of any of the provisions of said acts." It was passed in reference to the elaborate statutes then in force, enacted under the police power of the legislature for the regulation of the erection of buildings in the city of Boston. When it was passed, no such statute as that invoked by the attorney general was contemplated. Whether the words "acts relating to the erection or alteration of buildings or other structures in the city of Boston" were intended to include any new and independent acts of a kindred character that might afterwards be passed, as distinguished from existing acts and amendments of them, may well be questioned. The natural construction of the words would make them apply only to conditions then existing. The statute under which this information is brought, as we construe it, materially differs from the acts relative to the erection of buildings in the city of Boston existing when the previous statute was passed. It was enacted for a different purpose. It creates public rights annexed to public property. It calls for the payment of damages for the taking of an interest in lands, and exacts the payments from the city of Boston. The city has a pecuniary interest against the enforcement of the law. The statute does not provide a remedy for its enforcement, and therefore the remedies must be sought at common law. The kind of remedy provided by the statute in regard to the building laws gives no security to the public for the protection of their rights, for the party to enforce it has an adverse interest, and cannot be compelled to proceed. We are of opinion that St. 1898, c. 452, was not intended to create rights enforceable only under St. 1894, c. 257, but creates rights which are enforceable under general laws. In the opinion of a majority of the court, the entry must be: Demurrer and pleas overruled.

NOTE.

Power of Legislature to Compel Municipal Corporation to Incur Indebtedness for a Park.—Whether a debt shall be incurred for local purposes is a matter to be determined by the municipal corporations

or its citizens, and not by the legislature; and it has been held that the establishment of a park within the limits of a municipal corporation is a local matter, and not one which concerns the state at large. See People *ex rel.* Board of Park Commissioners *v.* Detroit, 28 Mich. 228, 15 Am. Rep. 202; People *v.* The Mayor, etc., of Chicago, 51 Ill. 17, 2 Am. Rep. 278.

KOGER

v.

MAYOR, ETC., OF CITY OF MADISON.

(*Supreme Court of Georgia, July 28, 1899.*)

Forfeiture of Bail Bond—Authority of Municipal Courts.—Under section 698 of the Political Code, a municipal court has no authority to forfeit a bail bond unless the proper municipal authorities have adopted ordinances for this purpose, prescribing the rules and regulations and proceedings for accomplishing this end. The fact that power is given to a municipal court to take bail for the appearance of accused persons does not necessarily imply the power of such a court to forfeit the bond. If no ordinance such as above referred to has been adopted, the remedy is to bring suit upon the bond in the proper court.

(Syllabus by the Court.)

ERROR by defendant from Morgan county superior court. *Reversed.*

Foster & Butler, for plaintiff in error.
W. R. Mustin, for defendant in error.

SIMMONS, C. J. It appears from the record that Overton was tried and convicted by the mayor of Madison for the violation of a municipal ordinance. He was dissatisfied with the judgment of the mayor, and appealed to the mayor and council. The charter of the city authorized the appeal, and authorizes the appellant to give bond and security for his appearance before the mayor and council. At the meeting of

this body at which the appeal was to be heard, the appellant failed to appear; whereupon a rule *nisi* was issued calling upon him and his security, Koger, to show cause why the bond should not be forfeited. This was made returnable within seven days from the issuance of the rule. On the day upon which the rule was returnable the appellant did not appear, and, on motion of the surety, the case was continued until the next week. At that time the mayor and council again met, and, neither the appellant nor the surety appearing, the rule was made absolute. An execution was issued, and levied upon the property of the surety, who filed an equitable petition to restrain the marshal from selling the property, on the ground that the judgment forfeiting the bond was null and void, as the mayor and council had no jurisdiction nor authority to render such a judgment; that such jurisdiction was not given them by the charter of the city; and that they had passed no ordinances providing any machinery by which the bond could be forfeited, if they had power to do so. The trial judge refused the injunction, and the surety excepted.

Section 698 of the Political Code gives full power and authority to municipal corporations "to provide, by ordinance, for the forfeiture of bonds given by offenders for their appearance before municipal courts, and to provide for the collection of the same from the principal and sureties to such bonds by judgment, execution, and sale." It was alleged in the petition, and admitted by the defendants, that no ordinance had been passed by the mayor and council making any provision for the forfeiture of bonds given by offenders for their appearance at the municipal court, or for the collection of the same by judgment, execution, or sale. It seems that the mayor and council acted without any ordinance whatever. The above-cited section of the Code gives them power and authority to forfeit a bond only when they shall have passed an ordinance for that purpose, providing the machinery or ways and means for accomplishing such forfeiture. It is clear, therefore, that the mayor and council were by this section given no power or authority to forfeit this bond and issue

execution thereon. It was claimed by counsel for the defendants in error that the fact that the power is given to the accused to appeal, and to give bond for his appearance before the mayor and council, authorize the mayor and council, by implication, to forfeit the bond they are authorized to receive. We know that the general rule is that where a power has been conferred upon a court to do certain acts, and the statute does not prescribe how they shall be done, the court has power, by necessary implication, as an incident to its jurisdiction, to carry into effect the power granted it. In the case of State *v.* Caldwell, 124 Mo. 509, 28 S. W. 4, it was held that "a court with power to take a bail bond has jurisdiction of a *scire facias* proceeding to enforce the same." A reading of the case will show that this was said with reference to the criminal court of St. Louis, which was organized to try state offenses. Perhaps the rule is as stated in cases of state courts proper, where they are given the power to take bail for the appearance of the accused, and nothing is said of the power to forfeit the bond in case of his nonappearance, but we think that a different rule should apply to municipal courts. These latter are courts which have jurisdiction to try only offenses against the ordinances of the city. They have no jurisdiction over offenses against the laws of the state, and it is well settled that municipal authorities have no power, except such as is given them expressly or by necessary implication. Courts organized under municipal charters have only such powers and jurisdiction "as are expressly conferred by statute or necessarily implied therefrom." Tied. Mun. Corp. § 104. "It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary [fair and reasonable] implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." Minturn *v.* Larue, 23 How. 435. "If, upon the whole, there be

fair, reasonable, substantial doubt whether the legislature intended to confer the authority in question, particularly if it relates to a matter extramunicipal or unusual in its nature, and the exercise of which will be attended with taxes, tolls, assessments, or burdens upon the inhabitants, or oppress them, or abridge natural or common rights, or devest them of their property, the doubt should be resolved in favor of the citizen, and against the municipality." 1 Dill. Mun. Corp. § 91, note 2. Did the general assembly of this state intend to give to the mayor and council of Madison power and jurisdiction to enter up a judgment against one of its citizens upon a bond given for appearance in that court? This power in municipal authorities is unusual to our system, or the system of any of the states where the common law prevails. Was there an intention to give this court jurisdiction to try a *quasi* civil case, and enter up judgment, without regard to the amount involved? The only power given by the charter to the mayor's court is to try offenses against the ordinances of the city; nothing is hinted at in relation to civil jurisdiction. The power to forfeit bail bonds is, as before remarked, unusual to a municipal court; and we have never heard of any municipal court, prior to the act of 1881 (Pol. Code, § 698), attempting to forfeit such bonds, although most of the charters have in them provisions allowing the accused to give a bond for his appearance on an appeal from the mayor's court. Is this power, then, to be necessarily implied from the fact that the mayor had power to take a bond for the appearance of the accused when he entered his appeal? Under the laws of Georgia, a justice of the peace has power, in a commitment trial, to take a bond from the accused when he continues the case for further investigation. In the case of Whitman *v.* Bullock, 45 Ga. 173, a justice of the peace continued a case for further hearing, and took a bond from the accused for his appearance. This court held that this was a legal and valid bond. The question arose upon a demurrer to the declaration in the superior court in a suit upon the bond, and the court

sustained the judgment of the lower court overruling the demurrer, thus holding that the suit on the bond was brought in the proper court to recover the penalty. Did the fact that the justice of the peace had a right to take this bond give him, by necessary implication, jurisdiction to forfeit it, and to issue a judgment thereon against the principal and his surety? We think not. So far as I know, there has never been a case in which a bond was forfeited in a justice's court in this state, resort being always had to the common-law remedy of a suit upon the bond in a court having jurisdiction. If a court had been established for the trial of offenses against the laws of the state, with the power to take bail, and there was no other mode of recovering the penalty in case of the nonappearance of the accused, the power to forfeit the bond would be raised by implication. But in a municipal court, which has no kind of civil jurisdiction, where the law provides an ample remedy for the recovery of the penalty, this implication, in our opinion, would not arise. For these reasons the court below erred in refusing the injunction. Judgment reversed. All the justices concurring.

BARNETT

v.

CITY OF ATLANTA.

(*Supreme Court of Georgia, Nov. 1, 1899.*)

Prosecution for Violation of Ordinance—Criminal Case.*—A prosecution for the violation of a municipal ordinance, punishable by fine or imprisonment, is a criminal case, within the meaning of the statute requiring that, "in all criminal cases, the bill of exceptions shall be tendered and signed within twenty days from the rendition of the decision."

(Syllabus by the Court.)

*See notes at end of case.

Barnett *v.* City of Atlanta

ERROR by defendant from Fulton county superior court. *Dismissed.*

S. N. Evins, for plaintiff in error.

J. A. Anderson and *J. I. Pendleton*, for defendant in error.

FISH, J. The question here presented for our decision is whether the prosecution for a violation of a municipal ordinance, punishable by fine or imprisonment, is such a criminal case as that a bill of exceptions therein, in which the accused complains of a judgment overruling his *certiorari*, shall be tendered and certified within 20 days from the rendition of such judgment. In Cranston *v.* Mayor, etc., 61 Ga. 572, it appeared that Cranston, who was charged with the violation of a municipal ordinance, was acquitted in the recorder's court. Upon *certiorari* by the mayor, etc., the decision of the recorder was reversed by the judge of the superior court, and direction given that Cranston be punished in accordance with the ordinance of the city which he was charged with having violated. To this ruling he excepted, and the judgment of the superior court was reversed; this court holding that, as the power of a municipal corporation to exercise police jurisdiction is a power delegated by the state, the corporation, as a party to a criminal proceeding, stands in the place of the state, and, inasmuch as the state cannot have a writ of *certiorari* or a writ of error to revise a judgment of discharge by its courts, it follows that a corporation cannot have a writ of *certiorari* to revise a similar judgment rendered by the corporation court on final trial of the accused. In Mayor, etc., *v.* Ethridge, 96 Ga. 326, 22 S. E. 985, Ethridge was convicted before the police court for the violation of an ordinance. He took the case by *certiorari* to the superior court, where a motion in behalf of the corporation to dismiss the *certiorari* was overruled. To the judgment overruling the motion to dismiss, the mayor, etc., excepted. This court held that the municipality could not prosecute the writ of error, and dismissed the same.

ATKINSON, J., in delivering the opinion, said: "Towns and cities, in the administration of those functions pertaining to police department, which by their charters are conferred upon them, represent, in a qualified sense, the sovereignty of the state;" and that "the Code provides, in express terms, that either party in a civil case, and the defendant in a criminal proceeding, in the superior court of this state, may except to any sentence, judgment, or decree. The right of exception is limited to the defendant in criminal cases. This court can only review the judgment of the lower court by a bill of exceptions; and inasmuch as no provision is made by the law by means of which the state can present, and have transmitted here, a bill of exceptions in a criminal cause, if there were no other legal or constitutional impediment to the reversal of a judgment rendered in favor of the defendant in the court below, this one difficulty is insurmountable." In Mohrman *v.* City Council, 103 Ga. 841, 31 S. E. 95, where one was convicted in a police court for the violation of a municipal ordinance, and carried his case by *certiorari* to the superior court, the case was recognized as being in its nature a criminal proceeding. In Mayor, etc., *v.* Wood (decided during the present term) 34 S. E. 322, the facts were similar to those in Ethridge's Case, *supra*, and the court held that "the decision of the superior court on *certiorari* reversing the judgment of a municipal court convicting one of a violation of a municipal ordinance is not subject to review by this court." Again, in Phillips *v.* Mayor, etc., 61 Ga. 386, it appears that Phillips and other liquor dealers doing business in the town of Stone Mountain filed their bill against the municipal authorities, praying that they be restrained from trying, convicting, and fining them for a violation of the provisions of an ordinance which the complainants alleged to be void. The injunction was denied, and complainants excepted. This court held that the injunction was properly refused. In the opinion rendered, BLECKLEY, J., said: "Injunctions or orders in the nature of injunctions are not granted by courts of equity to restrain proceed-

ings in criminal matters. * * * Chancery takes no part in the administration of criminal law. It neither aids the criminal courts in the exercise of jurisdiction, nor restrains or obstructs them." This case was followed in Garrison *v.* City of Atlanta, 68 Ga. 64, and in Paulk *v.* Mayor, etc., 104 Ga. 24, 30 S. E. 417, in each of which it was sought to enjoin the enforcement of a municipal ordinance; and this court held that injunction will not be granted to restrain a criminal proceeding. The statute in reference to the time within which bills of exceptions shall be tendered and certified provides for only two general classes of cases,—civil and criminal. Prosecutions in police courts for violations of municipal ordinances, punishable by fine or imprisonment, must, as to the provisions of such statute, be assigned to the one or the other of these classes; and, according to the rulings above cited, we think they must be classified as criminal cases. They certainly partake more of the nature of criminal than of civil cases. A municipal ordinance is a law for the protection of the public, in a qualified sense, it being designed for the protection of the municipality; and, while a civil statute of the state is enacted for the protection of the whole state, the punishment for the infraction of the ordinance, as well as of the statute, is for the violation of a public law. If the state itself, directly, should make the act an offense, and prescribe the punishment, there could be no question but that the act would be a crime, and the prosecution of it a criminal case. How can it make any difference, in principle, whether the state does this itself, or delegates the power to the municipality to enact the law and inflict the penalty for its violation? Moreover, if the violation of a municipal ordinance, punishable by imprisonment, is not a crime, then, under the provisions of the constitutions of the United States and of this state, forbidding involuntary servitude except as a punishment for crime, one convicted for such violation could not be required to labor upon the public works of the corporation during the term of his imprisonment, and municipalities would be deprived of what has

Notes

been from time immemorial their most efficient and salutary means of preserving order and enforcing obedience to their ordinances. See State *v.* West, 42 Minn. 147, 43 N. W. 845. Counsel for plaintiff in error cited the cases of Williams *v.* City Council, 4 Ga. 509, and Floyd *v.* Commissioners, 14 Ga. 354. While there may be some expressions in the opinions in those cases which upon a cursory reading may not seem to be in entire harmony with the ruling herein announced, yet, upon a careful examination of those decisions, it will be seen that they are not in conflict with what we now hold. What was really decided there was that the term "criminal cases," as used in that clause of the constitution of 1798 giving to the superior court exclusive jurisdiction in all criminal cases, except as therein provided, had reference to violations of the public laws of the state, and not to the infraction of municipal ordinances, and that the declaration in that constitution that "trial by jury, as heretofore used in in this state, shall remain inviolate," did not apply to trials before police courts, where pecuniary penalties were imposed. We may say further, in reference to the point ruled in the present case, that there is much reason for applying the rule for the speedy disposition of other criminal cases to prosecutions for the violation of municipal ordinances punishable by fine or imprisonment. As the bill of exceptions was not presented to and signed by the judge within 20 days from the judgment overruling the *certiorari* of the accused, the writ of error must be dismissed. Writ of error dismissed. All the justices concurring.

NOTES.

Proceedings for Violation of Ordinance—Application of Requisites Relating to Crimes.—In State *v.* Boneil, (Louisiana Sup. Ct., Dec. 1, 1890), 8 So. Rep. 299, it was held that violations of municipal ordinances are not usually or properly regarded as "crimes" in the sense in which that word is commonly used, which embraces only offenses against the public criminal statutes of the state; and the laws regulating forms of proceeding, and the constitutional provisions relating

Notes

to the latter, do not generally apply to the former. *Citing*, State *v.* Heuchert, 42 La. Ann. 270, 7 South. Rep. 329; Monroe *v.* Meuer, 35 La. Ann. 1192; 1 Dill. Mun. Corp. § 432 *et seq.* See also 8 Am. & Eng. Enc. Law (2d Ed.) 252 *et seq.*

Sufficiency of Affidavit or Complaint.—A complaint for the violation of a municipal ordinance, which states the number of the section and title of the ordinance violated, together with the date of its passage, is sufficient under the statute, the proceeding not being a criminal prosecution. City of Durango *v.* Reinsberg, 16 Colo. 327.

It is unnecessary for an affidavit filed before the judge of a recorder's court in the city of New Orleans, charging the violation of a city ordinance, to set out the charge in the manner and form and with the circumstantiality of an averment that is requisite in the confection of a criminal indictment. State *v.* Dunbar, 43 La. Ann. 836.

The precision required in indictments for crime before courts of record is not applicable to affidavits against violators of municipal ordinances before recorders' courts. An affidavit against defendant for keeping an assignation house at a designated place, in violation of section 8 of ordinance 4424, is a sufficient foundation for trial and sentence, although it does not state all the circumstances contained in the section referred to as constituting the offense. State *v.* Baker (La., Jan. 4, 1892), 10 So. Rep. 405.

Criminal or Civil Action—Review of Judgment.—A prosecution under a municipal ordinance for an offense not punishable by general statute is not a criminal proceeding, but a civil action, and a judgment in such action against the municipality may be reviewed on error. City of Durango *v.* Reinsberg, 16 Colo. 327.

An action by the city of St. Louis to recover a penalty for a violation of an ordinance thereof is a civil action, so far as concerns the plaintiff's right to a review of the judgment. The defendant in such case, may appeal from the judgment, but the only means of review given the plaintiff is by writ of error. (R. S. 1879, p. 1515, sec. 26.) City of St. Louis *v.* Marchel, 99 Mo. 475.

Trial of Person Arrested under Ordinance—Adjournment of Court.—Where the charter of a village fails to provide for or regulate the adjournment of causes commenced by warrant for the violation of ordinances, the proceedings are so far in their nature criminal, where commenced by the arrest of the defendant, that the trial, unless otherwise provided for, should be controlled by the provisions of law relative to criminal proceedings before justices of the peace, where the statute authorizes the trial of the person arrested in justice's court, which trial should be had within one week after the return of the warrant, pursuant to How. Stat. § 7094, unless longer deferred for reasons stated in said section. Village of Vicksburg *v.* Briggs, 85 Mich. 502.

Notes

Whether Breaches of Municipal Ordinances Are Crimes—Summary Convictions.—As a rule the offenses triable before municipal courts are not properly regarded as criminal, and yet may be such as to fully warrant the trial and conviction of the offender. While, therefore, the offense may not be specified in the general criminal laws of the state, unless the state constitution especially restricts the power of the legislature, that body or the municipality to which it has delegated its authority may authorize the summary conviction for specified offenses without trial by jury, and such conviction will be upheld. Vason *v.* Augusta, 38 Ga. 542; Williams *v.* Augusta, 4 Ga. 509; App. Floyd *v.* Commissioners, 14 Ga. 358; State *v.* Guttierrez, 15 La. Ann. 190; St. Peter *v.* Bauer, 19 Minn. 327; Tierney *v.* Dodge, 9 Minn. 166; McGear *v.* Woodruff, 33 N. J. Law, 213; Howe *v.* Plainfield, 8 Vroom (37 N. J. Law), 415; People *v.* Justices, 74 N. Y. 406; Johnson *v.* Barclay, 1 Harr. (N. J) 1; Byers *v.* Comm., 42 Pa. St. 89; State *v.* Conlin, 27 Vt. 318.

In one of the leading cases STRONG, J., states the principles that apply, with force and clearness. Byers and Davis *v.* Comm., 42 Pa. St. 89. The constitutional guarantee of a trial by jury does not prevent a summary trial and conviction for certain offences before a municipal court. Power in the legislature to declare that certain violations of municipal ordinances shall be punished summarily has been conceded from earliest times and has never conflicted with Magna Charta in England nor constitutional principles in the United States. Therefore those provisions of the various state constitutions which declare that "trial by jury shall be as heretofore," etc., cannot be said to embrace such cases. People *v.* Justices, 74 N. Y. 406; State *v.* Conlin, 27 Vt. 318; *In re* Goddard, 16 Pick. 504; Williams *v.* Augusta, 4 Ga. 509; City of Keokuk *v.* Dressell, 47 Iowa 597; Mayor *v.* Dechert, 32 Md. 369; Wanser *v.* Atkinson, 43 N. J. Law, 571; Zelle *v.* McHenry, 51 Iowa, 572.

Apparent Conflict of Authority.—It is sometimes said that there is conflict of authority as to whether such an apparent infringement of constitutional rights is generally upheld. There seems to be no real doubt upon the point. In the only cases where any disposition appears to restrict the power of municipal courts, the circumstances of the case make it an exception. Thus in Plimpton *v.* Town of Somerset, 33 Vermont, 283, it was held, in an action on the case to recover damages of a town for injuries upon a highway, that an act of the legislature providing for a compulsory reference of suits at law, and which makes the referee's report *prima facie* evidence of the facts therein reported, in case either party claims a trial by jury, does, so far as it applies to actions suitable for trial by jury according to the course of the common law, impair the right to such a jury trial as is

guaranteed by the constitution of Vermont, and is therefore void. Several other cases, constantly referred to, belong in the same category: Fink *v.* Milwaukee, 17 Wis. 26; State *v.* Lockwood, 43 Wis. 403; Comm. *v.* Shaw, 1 Pittsburg (Pa.) 492; Borough of Dunmore's App., 52 Pa. St. 374; People *v.* Controller, 18 Mich. 445; County of Wayne *v.* Detroit, 17 Mich. 390; People *v.* Cox, 76 N. Y. 47.

Right of Appeal—Jury Trial.—It is very generally acknowledged that where the right to summarily convict, as mentioned above, cannot be sustained, yet if the right of appeal to a court where a trial by jury may be had remains to the prisoner, this is a sufficient check upon arbitrary power to secure individual rights. McDonald *v.* Schell, 6 S. & R. (Pa.) 240; Jones *v.* Robins, 8 Gray (Mass.), 329; Dorgan *v.* Boston, 12 Allen (Mass.), 223; Beers *v.* Beers, 4 Conn. 535; Stewart *v.* Mayor, 7 Md. 501; Emporia *v.* Vollmer, 12 Kan. 622; Morford *v.* Barnes, 8 Yerger (Tenn.), 444.

Effect of Acquittal on Appeal.—Where a city has authority to pass a penal ordinance, a prosecution thereunder is a penal proceeding and an acquittal on appeal ends the defendant's liability. State *v.* Vail, 57 Iowa, 560.

SPARKS MFG. CO.

v.

TOWN OF NEWTON.

INGERSOLL

v.

SAME.

(*Court of Errors and Appeals of New Jersey, March 5, 1900.*)

Water Courses—Diversion for Public Purposes by Municipality—Agreement to Compensate—Equity Jurisdiction.—When a riparian proprietor seeks the aid of a court of equity to restrain the diversion of water by a municipal corporation for public purposes, and offers to forego his right to an injunction on recovering just compensation, which he asks the court to determine, and the defendant, in its answer, consents to pay such compensation so to be determined by the court, in case the court considers the complainant entitled to an injunction, the court has jurisdiction to ascertain the amount of such compensation.

Sparks Mfg. Co. *v.* Town of Newton

Same—Same—Riparian Rights.*—A municipality, which buys a piece of land on a private stream, several miles distant from its corporate limits, does not thereby become entitled, as riparian owner, to draw from the stream a supply of water for the inhabitants of the town.

Same—Same—Same.—The town of Newton has no authority to divert water from private streams, to the detriment of lower riparian owners, on condition that it will store storm water, and give it out into the streams in dry times, and thus confer a compensatory benefit on those owners, they not consenting thereto.

Same—Same—Compensation.—In ascertaining just compensation for the diversion of water from a mill, the difference between the market value of the mill before the diversion and its market value afterwards is usually a simpler and safer criterion than estimates of the probable cost of producing by steam at the mill the power which the diverted water would supply, and than estimates of the probable value of the water power at the mill, based on the rental value of power at other places more or less distant and dissimilar.

(Syllabus by the Court.)

APPEAL by defendant from court of chancery. *Reversed.*

Thomas Kays, for appellant.

C. L. Corbin, for respondents.

DIXON, J. The circumstances of these cases are very fully stated in the preface and opinion of VICE CHANCELLOR PITNEY, 57 N. J. Eq. 367, 41 Atl. 385. With the conclusion there expressed touching the power and duty of the court, on the pleadings and evidence, to fix the compensation that the defendant ought to pay to the complainants as a condition of withholding the injunctions to which they would otherwise be entitled, this court agrees. Only with respect to the amount awarded do we find reason for dissent. The right to be obtained by the defendant under these decrees is the right to abstract from one of the tributaries of the Wallkill river a definite quantity of water, which, in its natural course, would flow past the complainant's mills. The opinion of the vice chancellor deals with the right to divert 800,000 gallons per day, and this quantity of water is shown by him to be capa-

*See note at end of case.

ble of producing 2.54 continuous horse power at the Sparks Company's Mill, and 2.65 continuous horse power at Ingersoll's Mill. On this basis the learned vice chancellor proceeds with two calculations: First, to ascertain the probable annual cost of producing the same power by steam at these mill sites; and, second, to ascertain the probable annual value of the power at these localities, in view of the rental price of such power in other places more or less distant and dissimilar. Having thus formed an estimate of the annual value of the power, he compounds that value at 4 per cent. for 40 years, and finds the present value to be $3,302 at the Sparks Mill and $2,650 at the Ingersoll Mill, and therefore awards those sums. In this course of reasoning, little, if any, attention was paid to the actual market value of the mill sites; and yet in Packard *v.* Railway Co., 54 N. J. Law, 553, 25 Atl. 506, this court declared that, when only part of a person's property is taken, just compensation will be made by awarding the difference between the market value of the property before any part was taken, and the market value of the property after the taking. While it may be proper, in such cases as the present, to take into consideration the matters on which the vice chancellor's awards rest, still we deem the difference between market values a simpler and safer criterion, and, when it appears that by following other guides a result is reached utterly irreconcilable with this criterion, that result cannot be sustained. That such incompatibility exists in the cases before us will be made manifest by a few considerations now to be stated. The testimony of witnesses living in the neighborhood of the Ingersoll Mill, and familiar with it for many years, is to the effect that the fair market value of the whole plant in 1896, when these bills of complaint were filed, was five or six thousand dollars. It has a total capacity to use 132 horse power of water, which will be furnished by about 1,100,000,000 gallons of water per month. A tabulated statement of the natural flow of the river at Ingersoll's Mill,

known in the case as "Vermeule's Table D," which appears to have been accepted as trustworthy by all parties at the trial, shows that during eight months of the average year there is more than a sufficient supply of water for the full capacity of the mill, that during June and September the supply is above five-sixths of the capacity, and that during July and August the supply exceeds five-ninths of the capacity. These data indicate an annual supply equivalent to 118 continuous horse power at this mill. Now, if, for the abstraction of 2.65 continuous horse power, the mill owner ought to be paid $2,650, then for the abstraction of the whole power he ought to be paid $118,000. Such an inference proves the extravagance of the award. In April, 1896, the plant of the Sparks Manufacturing Company was purchased by this company for $75,000. The plant included the water machinery, with a total capacity of 170 horse power, steam machinery having 100 horse power, mill buildings, and several acres of land. To run the water plant to its full capacity, the company required about 1,360,000,000 gallons of water per month, and, besides, it used about 30,000,000 gallons per month for condensing steam, washing fabrics, etc. Vermeule's table D shows that during eight months of the average year there is more than a sufficient supply of water for the full capacity of this water power, that during June and September the supply is about two-thirds of the capacity, and that during July and August the supply is about four-ninths of the capacity. These data indicate an annual supply equivalent to 141 continuous horse power at this mill. If, for the abstraction of 2.54 continuous horse power of water the company ought to be paid $3,302, then for the abstraction of the whole power it ought to be paid $183,300. This inference proves the extravagance of the Sparks Company's award. We think there is another error in the basis on which the present awards are made: Assuming that the defendant withdraws 800,000 gallons of water per day,—*i. e.* 25,000,000

Note

gallons per month,—Vermeule's table D shows that in an average year after the allowance to the defendant is taken, more water will flow pass these mills during eight months than either of the mills can utilize; so that only during four months will the supply available in the mills be perceptibly diminished. During those months the water diverted by the town would furnish three horse power at the mills, and three horse power for four months would be equivalent to one continuous horse power. Thus, even on the assumption that water power at these mills is as valuable as the learned vice chancellor deemed it to be, allowances for 2.54 and 2.65 continuous horse power are about two and a half times too large. In our judgment, an award of $500 to Mr. Ingersoll and of $750 to the Sparks Manufacturing Company will afford ample compensation to them for the abstraction by the defendant of 800,000 gallons of water per day. Under the election by the town to abstract 1,250,000 gallons per day, those sums must be proportionally increased. Let the present decrees be reversed, and decrees be rendered in accordance with the judgment above stated.

NOTE.

Water Supply—Municipal Corporation as Riparian Owner—Right to Divert Distant Water Course.—The fact that a municipal corporation owns land on a water course, distant from its limits, does not entitle it, as a riparian owner, to draw from the stream a supply of water for its inhabitants. Stein *v.* Burden, 24 Ala. 130; Suffield *v.* Hathaway, 44 Conn. 521; Emporia *v.* Soden, 25 Kan. 588, 37 Am. Rep. 265; Ætna Mills *v.* Waltham, 126 Mass. 422; Fleming's Appeal, 65 Pa. St. 444.

GLEASON *et al.*

v.

WAUKESHA COUNTY *et al.*

(*Supreme Court of Wisconsin, May 23, 1899.*)

Local Assessments—Statutory Requirements.*—Where there has been a substantial compliance with statutory requisites in regard to the imposition of local assessments, and the complainant is unable to show that any injustice has been done to him, equity will afford him no relief against the assessments.

Same—Notice to Property Owners.†—It was competent for the city council to delegate to the board of public works the mere executive duty of giving notice of proposed improvements to the owners of the property to be charged with the cost thereof.

Same—Validity.—Where legal authority existed to make local assessments for street improvements, and sufficient has been done in an attempt to comply therewith to give the municipality jurisdiction in the given case, subsequent irregularities are immaterial in equity as against the duty of the property owner to bear his just share of the expense of the improvement.

Same—Gas and Water Connections—Constitutional Law.—The imposition of local assessments to defray the costs of making gas and water connections with water and gas mains and laying pipes from such connections to the curb line of the street in front of the property assessed is not unconstitutional merely because the mains are the property of private corporations.

Same—Same—Benefits.—In an action to avoid such assessments, it cannot be successfully contended that gas and water connections with the mains, put in pursuant to a resolution of the city council to pave the street, are of no benefit to property owners until they are ready to use them.

Same—Constitutional Law.—A local assessment for such purpose is constitutional where it does not exceed the benefit accruing from the improvement to the property assessed.

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*See *note, ante*, p. 267 *et seq.*

†See notes at end of case.

Gleason *v.* Waukesha County

APPEAL by defendant from Waukesha county circuit court. *Reversed.*

Case Stated.

Action to avoid special taxes levied on property of plaintiffs for the expenses of making gas and water connections with water and gas mains and laying pipes from such connections to the curb line of the street in front of such property in the city of Waukesha, Wis., such taxes having been levied pursuant to an attempt by the municipal authorities of such city to comply with subdivision 223, § 925, Rev. St., which provides that: "Whenever the council shall order the paving or repaving of any street in which water, gas mains and sewers or either of them shall have been previously laid or constructed they may also by resolution require water and gas service pipes and house drains to be first laid in such street, at the cost of the property fronting thereon, from the main sewer, water and gas mains in such street to the curb line on either side thereof, at such intervals as the council shall direct, along the whole length of such paved street, except at street and alley crossings, and notice shall thereupon be given to the owners or occupants of the property adjoining such street, by publication thereof for six days in the official paper, requiring them to do such work opposite their respective lots according to plans and specifications to be before prepared and filed in the office of the board of public works, city clerk or city surveyor, as the counsel shall prescribe, showing the location and size and the kind and quality of material of such lateral sewers or drains and water and gas service pipes; and if such owners or occupants shall refuse or neglect to do the same before the paving or repaving of said street so ordered and within ten days after the publication of such notice, the board of public works or the officer or officers discharging the duties thereof may procure the same to be done and charge and assess the expense thereof to the lots or parts of lots fronting upon such work in the manner provided in and by sub-chapter 18 of this chapter, and the same shall be levied and collected as other special assess-

ments are levied and collected: provided, that no street shall be paved or repaved by order of the council unless the water and gas mains and service pipes and necessary sewers and their connections shall, as required by the council, be first laid and constructed in that portion of such street so to be paved or repaved." The reasons assigned in the complaint for avoiding the taxes are, first, because notice of the improvements was not given or the connections ordered constructed by resolution of the common council duly adopted, nor were any of the steps required to charge plaintiffs' property with the costs thereof taken in the manner required by the city charter; second, because the city charter provision violates the constitutional inhibition against taking private property for public use without just compensation therefor; third, because the water and gas systems of the city are private property, the owners of which furnish water and gas only upon application of property owners, and that plaintiffs did not request the putting in of the connections between the mains and the street curb line in front of their property, neither did they use or derive any benefit therefrom or have any authority to use the connections without the consent of the corporations owning the water works and gas works systems. The allegations as to all irregularities in the proceedings of the city council, upon which the taxes complained of are based, were put in issue by the answer. On the trial the following facts were established by the evidence: The water works and gas works systems are the property of private corporations. Persons owning lots abutting on streets where the water and gas mains are located can obtain service, either water or gas, only by contract with the corporation owning the main. Plaintiffs are the owners of the property taxed. All the allegations of fact in respect to the taxes are true, except those in regard to failure of the municipal authorities to comply with the city charter in respect to making such taxes a legal charge against such property. The following proceedings were taken for the purpose of making the expense of putting in

the gas and water connections a legal charge upon plaintiffs' property: A resolution was adopted by the common council ordering the street to be paved and the city engineer to prepare and file in his office plans and specifications showing the location, size, kind and quality of material of lateral sewers or drains and water and gas service pipes to be thereafter ordered, to the curb line on both sides of the street. The city engineer complied with such resolution and his work was approved by the city council. The board of public works was, by vote of the council, empowered "to force the connections." The action of the council at this point was evidenced by the record as kept by the city clerk, in the following language: "Plans for connections for water and gas and house drains on Broadway, Clinton, Main and Madison streets, were presented by the city engineer, and on motion of Alderman Dick were approved, and the board of public works empowered to force the connections." A notice to private owners that they are required to construct or cause to be constructed the water and gas connections in accordance with the plans and specifications on file in the office of the city engineer of the city was given by publication in the official paper of the city for three successive weeks. The notice was signed by the members of the board of public works, stated that the council had ordered the paving of the street, and authorized the board to notify private owners to make the gas and water connections, that notice was given pursuant to such authority, that the proceedings were under section 223, c. 20 of the city charter, that the work was required to be done by the property owners by a day therein named, which, as to length of time, complied with the charter, and that if the work was not done within such time by the property owners, it would be let by contract as provided by law. The property owners failed to do the work and thereupon it was contracted for pursuant to an award made on competitive biddings on public notice, published in the official paper of the city for three successive weeks, that

the work would be let. There was no question on the trial but that the contracts were fairly made and the charges for the work and material were just. The court found the facts in favor of plaintiffs, and in respect to the alleged irregularities and jurisdictional defects found that the council, by resolution, ordered the streets paved, and that plans therefor, including gas and water connections, were prepared by the city engineer and adopted by the council, but that the council did not adopt any resolution requiring gas and water connections to be constructed at the expense of the abutting property. The court specially found, in addition, that the gas and water mains were under the control of private corporations and that the city was powerless to make connections therewith except by permission of such corporations, and that the connections were for the benefit of the corporations and not the public. Further, that the work was done against the protest of plaintiffs as regards charging their property with the expense thereof. The conclusion of law was that the taxes were illegal and void and plaintiffs entitled to a judgment restraining the county clerk from selling their property for the payment of such taxes. Judgment was rendered accordingly.

T. W. Parkinson, *Vernon Tichenor*, and *E. D. Walsh*, for appellants.

Ryan & Merton, for respondents.

MARSHALL, J., (after stating the facts). The tax complained of seems to have been held invalid by the trial court because the common council of the city of Waukesha failed to pass a resolution requiring the construction of gas and water connections at the cost of the property fronting on the street. We are unable to sustain the finding of fact that no such resolution was passed. True, the evidence does not show that the council acted on the subject in literal compliance with the statutory call for a resolution, so far as relates to mere matters of form, but it is the substance of things that

governs when application is made to a court of equity for relief. Where there has been a substantial compliance with statutory requisites in regard to the imposition and collection of special taxes or legal assessments, and the complainant is unable to show that any injustice has been done to him, equity will afford him no relief against such taxes or assessments. Wells *v.* Supply Co., 96 Wis. 116, 70 N. W. 1071; Hennessy *v.* Douglas Co., 99 Wis. 129, 74 N. W. 983. If the doctrine of strict construction, with all the steps necessary to the imposition of a special tax, obtained in equity independent of any actual injustice to the property owner, it must be borne in mind that strict compliance with a statute does not mean, necessarily, literal compliance, using the term in regard to mere matters of form, unless that is expressly required by the statute. Hunt *v.* Wenger (Wis.), 77 N. W. 901. In the absence of such requisite, a substantial compliance with all things designed to safeguard the interests of property owners satisfies all the demands of strict compliance, under the rule in that regard often stated in actions for relief against special taxes.

Local Assessments—Statutory Requirements.

Under the charter of the city of Waukesha the municipality was prohibited from paving a street in which gas and water mains were located without first requiring connections to be made therewith and pipes run therefrom to the curb lines of the street. There was no way provided for complying with that requirement except by following the provisions designed to compel the abutting property owners to bear the expense. When the common council of the city, after taking the required steps preliminary to ordering the work to be done at the cost of the property fronting on the street, including a formal resolution for paving the street and directing the preparation of plans and specifications for water and gas service connections and pipes to be thereafter ordered to the curb lines and the approval of such plans and specifications, by a recorded vote directed the work to proceed and "the board of public works to force the connections," the charter

provision in regard to ordering the work done at the cost of the property fronting on the street was in effect complied with. The plans for the work, made in accordance with the preliminary resolution and the order of the board to proceed with the paving and force the connections, with the charter provision to which such direction clearly referred, to all intents and purposes were parts of one complete proceeding by resolution, as the charter required. The subsequent proceedings were free from prejudicial irregularities if there were any at all. The charter did not require the council, as such, to give notice to the property owners to proceed with the work of putting in the service pipes. It simply required notice to be given, by authority of the council of course, but not necessarily by the council. It was competent for the council to delegate to the board of public works the mere executive duty of giving the notice and causing the work to be done in the event of the property owners themselves failing to do it within the time limited in the notice.

Same—Notice to Property Owners.

If there were irregularities as to the manner in which the council proceeded to charge plaintiffs' property with the special tax, as before indicated, it by no means follows that equity can afford them relief. It has been repeatedly held by this court that where legal authority exists to make local assessments for street improvements, and sufficient has been done in an attempt to comply therewith to give the municipality jurisdiction of the subject in the given case, subsequent irregularities are immaterial in equity as against the duty of the property owner to bear his just share of the expense of such improvement. In Wells *v.* Supply Co., *supra*, it was held that where an assessment of benefits had been properly made so as to obtain a basis for apportioning the cost of a pavement, subsequent irregularities were not necessarily fatal to the tax. In Hennessy *v.* Douglas Co., *supra*, as to a sewer tax where the cost of the improvement was required to be assessed by the frontage rule, it was held that the establishment of the sewer

Same—Validity.

district, and the filing and approval of the plans for the sewer, in connection with the law making the abutting property liable for a certain amount per front foot for sewer construction, satisfied the essential requisites of jurisdiction; and in the same case, as to a sidewalk tax, where the sidewalk was required to be constructed at the expense of the owners of the abutting lots, the basis of the assessment being the actual cost of the improvement as to each such lot, it was held that the determination of the common council to make the improvement, and advertisement for bids and letting of the work in a fair and public manner, satisfied all jurisdictional requirements necessary to make the property equitably chargeable with its just proportion of the expense. Within the principles of those cases, plaintiffs here have shown no ground for equitable relief. The law was ample to authorize the imposition of the taxes complained of. The street was regularly ordered paved and plans for the gas and water connections were filed and approved. That gave the council jurisdiction to proceed to take all necessary subsequent steps to charge abutting property with the costs of laying the gas and water pipes. No notice was required, or proceeding, to arrive at a basis for the assessment of the taxes as to the amount of such assessment, other than the public letting of the contract to the lowest responsible bidder, because the law fixed, as a basis of the charges against abutting property, the cost of the work as to each parcel of such property. The rule is well established that where jurisdiction has been obtained by the ascertainment of a proper basis for the valuation of the amount of local assessments, and legal authority exists for such assessments, equity will not furnish relief against the mere irregular execution of the law where no injustice is shown, but will leave a complainant to such remedy as he may have at law. The owner of taxable property, where he seeks relief in equity, either as regards a general or local assessment, must be prepared to show more than that the taxes are illegal. He must show that they are inequitable and must pay all that in equity and good con-

science he ought to pay, or suffer being turned away without any remedy whatever. That rule is fatal to the judgment appealed from, as there appears to be no question but that the putting in of the gas and water pipes was by public authority, pursuant to a resolution of the council to pave the street and its approval of plans for the gas and water connections, and no question is raised but that the amount of the tax was a just measure of the labor and material required for the connections.

It seems that the trial court deemed the private ownership of the gas and water mains, and control of making service connections therewith, as significant and warranting a conclusion that the taxes complained of were for expenses incurred for the benefit of the corporations and not the benefit of the public. As to the property owners it appears that the court did not discover any benefit whatever from the laying of the service pipes. On that portion of the findings and conclusions respondents argue, both that the imposition of the taxes was a violation of the constitutional inhibition against taking private property for private use and also the taking of private property for public use without just compensation. The findings on this branch of the case seem to be subject to many infirmities. The control of making connections with the mains was vested in the private corporations in order to guard against unskillful work in that regard, liable to seriously jeopardize the safety of property and the convenience of all patrons of the water and gas systems. It was a mere matter of insurance against serious dangers that would otherwise exist, and was for the benefit of the public generally, as much as for the benefit of the corporations. It gave the corporations no power whatever to deny service from their systems of water and gas mains, and imposed no duty upon them other than to make the necessary connections with such mains with reasonable promptness and at reasonable cost whenever desired. As owners of public franchises the corporations were bound to allow connections to

Same—Gas and Water Connections—Constitutional Law.

be made with the mains to serve all property fronting on the streets where the mains were located, but at the expense of the owners of such property. The franchises called for delivery of water and gas at suitable outlets on the mains in front of property, not for delivery at the curb lines of lots. The service pipes were the property of the lot owners, not of the corporations. Such corporations paid for the privilege of controlling the matter of connecting service pipes with the mains by doing the work when needed at reasonable cost, or permitting the property owners to have it done by some other agency. The mere existence of the service pipes was no benefit to the corporations, but was rather an element of danger. To say that laying gas and water pipes in advance of paving is no benefit to the public, is contrary to common knowledge of persons of average experience in municipal affairs. Such a preparation of the street for the laying of a pavement avoids subsequently tearing up the street and making excavations, which would greatly impair the usefulness of the way during the progress of the work. It avoids many dangers of personal injuries to travelers, which the public corporation might be called upon to compensate, a very important element, as the records of our court show. It avoids danger of permanent impairment to the pavement, which is quite likely to result from disturbing it in sections. In such cases great care is required in filling in excavations and restoring the street, in order that it may be in as good a condition as before. Other important considerations could be mentioned, altogether rendering the laying of gas, sewer and water connections in streets in advance of paving, of such importance that it is customary to require it to be done by law, as in the charter under which the city corporation of Waukesha exists. Whether public interests require all work that may properly be required to be done under the surface of a street, to be done before laying a pavement thereon, is primarily a legislative question; and when the lawmaking power has determined it, and along the lines of wise munic-

ipal administration as demonstrated by experience, it is going a great way to judicially declare that such determination is wrong.

Same—Same—Benefits.

Again, the idea in the finding of the trial court, inferentially expressed, and pressed upon us by counsel for respondents, that the laying of the service pipes was of no benefit to the property owners because they were not ready to use them, cannot be sustained. It is generally considered that property fronting on a street is increased in value by the laying of water, gas and sewer pipes, at least to the extent of the actual cost thereof, and municipal regulations are largely based on that theory, and are universally sustained by the courts so far as the burden imposed upon abutting property does not substantially exceed the benefits thereto. Such improvements, and the incidental duties in regard to them, public and private, are classed with sidewalks and pavements. The law is too well settled on this subject to warrant any extended discussion of it here. No one can own property in a city and rightfully insist upon isolating it from all other property so far as burdens are concerned that result necessarily from those improvements that make communal life desirable. The private benefit and duty, and the public right to take private property for public use upon rendering just compensation therefor, and the sovereign power to make and enforce reasonable police regulations, operate together to control the subject of constructing streets and sidewalks and appurtenances of abutting property that must be located under the street, so as to impose the cost of such improvements upon abutting property at least to the extent of the benefits which accrue to the property from the improvements, and there is much authority to the effect that the imposition may exceed the benefits where an improvement is required by reasonable police regulations.

Numerous instances are found in the books where assessments for gas and water pipes in streets have been sustained.

Notes

Same—Constitutional Law.

In Allentown *v.* Henry, 73 Pa. St. 404, a law authorizing local assessments for water pipes was challenged as unconstitutional because the benefits from such improvements were all general; but the court held that the benefits were chiefly local, as the use of the water was localized as to each parcel of abutting property, and the effect of laying the water pipes was to enhance the value of such property. In Allen *v.* Drew, 44 Vt. 174, it was held, substantially, that there is no difference between a local assessment for a sidewalk and one for a sewer or water service; that each in a degree benefits the public generally, but local property particularly because of its enhanced value from the improvement; that public interest justifies public control as to time of making such improvements, and the local benefit justifies the local assessment to pay the costs thereby incurred, and that the question of whether the property charged is occupied or vacant is immaterial. In Ohio local assessments for gas construction were sustained. Jonas *v.* City of Cincinnati, 18 Ohio, 318; Creighton *v.* Scott, 14 Ohio St. 438.

There is no need to prolong the discussion. The charter provision under which the taxes complained of were imposed upon plaintiffs' property, contemplates that the cost of laying gas and water service pipes will be balanced by an equivalent benefit to the property fronting on the street. So far as the evidence shows there was such equivalent in fact, hence, under the most recent holdings as to constitutional power to make such assessments, the law itself, and the taxes imposed under it, must be sustained so far as any objection thereto is made on constitutional grounds. Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187.

The judgment of the circuit court is reversed and the cause remanded with directions to dismiss the complaint with costs.

NOTES.

LOCAL ASSESSMENTS—NOTICE TO PROPERTY OWNER.

It is essential to the validity of special assessment proceedings that the property owner should be given such notice thereof as to

Notes

afford him an opportunity to be heard, where the exercise of judgment is necessary in estimating the proper amount of the assessment.

United States.—Paulsen *v.* Portland, 149 U. S. 38; Lyon *v.* Alley, 130 U. S. 177, 27 Am. & Eng. Corp. Cas. 99; Walsten *v.* Nevins, 128 U. S. 578, 27 Am. & Eng. Corp. Cas. 198; Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. Rep. 385; Murdock *v.* Cincinnati, 39 Fed. Rep. 891; Scott *v.* Toledo (C. C.), 22 Am. & Eng. Corp. Cas. 479.

Alabama.—Lehrman *v.* Robinson, 59 Ala. 219.

California.—Patten *v.* Green, 13 Cal. 355; Hewes *v.* Reis, 40 Cal. 455; People *v.* Reay, 52 Cal. 423.

Colorado.—Brown *v.* Denver, 7 Colo. 305, 3 Am. & Eng. Corp. Cas. 630.

Connecticut.—Clapp *v.* City of Hartford, 35 Conn. 66.

Illinois.—Cleghorn *v.* Pastlewart, 43 Ill. 423; Darling *v.* Gunn, 50 Ill. 424; Jenks *v.* Chicago, 48 Ill. 296; Ottawa *v.* Railroad Co., 25 Ill. 43.

Indiana.—Bozarth *v.* McGillicuddy, 19 Ind. App. 26, 47 N. E. 397; McEneney *v.* Town of Sullivan (Ind. Sup. Ct.), 25 N. E. Rep. 540; Barber Asphalt Paving Co. *v.* Edgerton Ind., 25 N. E. Rep. 436; Kuntz *v.* Sumption, 117 Ind. 1, 23 Am. & Eng. Corp. Cas. 531; Garvin *v.* Daussmann, 114 Ind. 429; Uhl *v.* Moorhouse (Ind. Sup.), 37 N. E. 366; Stephenson *v.* Salem, 14 Ind. App. 386, 42 N. E. 44.

Iowa.—Gatch *v.* Des Moines (Iowa), 3 Am. & Eng. Corp. Cas. 622; Lyman *v.* Plummer, 75 Iowa 353; Starr *v.* Burlington, 45 Iowa 87; Mason *v.* Messenger, 17 Iowa 261; Amery *v.* City of Keokuk, 76 Iowa 701; Ford *v.* North Des Moines, 45 N. W. Rep. 1031.

Kansas.—Gilmore *v.* Hentig, 33 Kan. 156; Lyon Co. *v.* Sargeant, 24 Kan. 572.

Maryland.—Ulman *v.* Baltimore (Md.), 32 Am. & Eng. Corp. Cas. 228.

Massachusetts.—Grace *v.* Board of Health, 135 Mass. 490; Salem *v.* Eastern R. Co., 98 Mass. 431; Walker *v.* Boston & M. R. Co., 3 Cush. 1; Northampton *v.* Abell, 127 Mass. 507; Fitchburgh R. *v.* Fitchburgh, 121 Mass. 132.

Michigan.—Sligh *v.* City of Grand Rapids (Mich Sup. Ct.), 47 N. W. Rep. 1093; Power's Appeal, 29 Mich. 504; Paul *v.* Detroit, 32 Mich. 108; Thomas *v.* Gain, 35 Mich. 155; Butler *v.* Supervisors, 26 Mich. 22; Williams *v.* Detroit, 2 Mich. 560.

Missouri.—State *v.* Lundell Hotel Co., 90 Mo. App. 453; Palmyra *v.* Morton, 25 Mo. 593; Risley *v.* St. Louis, 34 Mo. 404.

Nebraska.—Barker *v.* Omaha, 7 Am. & Eng. Corp. Cas. 293; Medland *v.* Connell, 77 N. W. 437; Walkeley *v.* Omaha *et al.* (Neb.), 78 N. W. 511, 1 Mun. Corp. Cas. 557.

Notes

New Jersey.—State *v.* Hudson, 5 Dutch (N. J.) 475; Brewster *v* Newark, 3 Stockt. Ch. (N. J.) 114; State, Landis *v.* Vineland (N. J. Sup.), 60 N. J. L. 264, 37 Atl. 625; State *v.* Elizabeth, 40 N. J. L. 278; State *v.* Road Com'rs, 41 N. J. L. 83; State *v.* Plainfield, 38 N. J. L. 95.

New York.—Matter of Trustees, etc., 31 N. Y. 574; Ireland *v.* Rochester, 51 Barb. (N. Y.) 414; Matter of Ford, 6 Lans. (N. Y.) 92; Merritt *v.* Portchester, 71 N. Y. 309; *In re* Village of Middletown, 82 N. Y. 196; Stuart *v.* Palmer, 74 N. Y. 183; Remsen *v.* Wheeler, 105 N. Y. 573; Jordan *v.* Hyatt, 3 Barb. 275; Overing *v.* Foote, 65 N. Y. 263; *In re* Delaware, etc., Canal Co., 8 N. Y. Supp. 352; Cowen *v.* West Troy, 43 Barb. 48.

Ohio.—Schmidt *v.* Elemwood Place, 15 Ohio C. C. 351, 8 Ohio C. D. 113; Baltimore, etc., R. Co. *v.* Wagner, 43 Ohio St. 75; Miller *v.* Graham, 17 Ohio St. 1.

Oregon.—Strowbridge *v.* Portland, 8 Oregon 467.

Pennsylvania.—Wilvert *v.* Sunbury Borough, 81 Pa. St. 57; Philadelphia *v.* Miller, 49 Pa. St. 440.

Wisconsin.—State *v.* Fond du Lac, 42 Wis. 286.

In Ulman *v.* Mayor, etc., of Baltimore (Md.), 32 Am. & Eng. Corp. Cas. 228, which was an action to restrain the collection of a special assessment for street improvement, McSHERRY, J., in delivering the opinion of the court, said: "The entire cost of the work, the distribution of that cost between the city and the adjoining proprietors, and the establishment of a system – whether by the front-foot rule, or by reference to the intrinsic value of each parcel of land bounding on the street, or by some other standard—whereby the proportion of each person liable to contribute may be fixed, are not prescribed by the act of assembly, but are left, under it, to the discretion of the mayor and city council of Baltimore. Can that discretion be lawfully exercised by the municipality without notice to the individuals whose property rights are directly involved? In other words, are those rights, under these conditions, protected by the provisions of the federal and state constitutions which, in substance, declare that no man shall be deprived of his life, liberty, or property without due process of law? Due process of law is not confined to judicial proceedings. The article of the constitution is a restraint on the legislative as well as on the excutive and judical powers of the government, and cannot be so construed as to leave the legislature free to make any process due process of law by its mere will and pleasure. Murray *v.* Hoboken L. & Improvement Co., 18 How. (U. S.), 272. There would seem to be no doubt that notice, in all such cases as the present, is required to constitute due process of law, and is essential to the validity of the assessment. Walston *v.* Nevins, 128 U. S. 578, 27

Notes

Am. & Eng. Corp. Cas. 198; Palmer *v.* McMahon, 133 U. S. 660; Spencer *v.* Merchant, 125 U. S. 345; Hagar *v.* Reclamation Dist., 111 U. S. 701; Davidson *v.* New Orleans, 96 U. S. 97; McMillen *v.* Anderson, 95 U. S. 37; Stuart *v.* Palmer, 74 N. Y. 183; Overing *v.* Foote, 65 N. Y. 263; Philadelphia *v.* Miller, 49 Pa. St. 440; Butler *v.* Saginaw Co., 26 Mich. 22; Thomas *v.* Gain, 35 Mich. 155; Patten *v.* Green, 13 Cal. 325; Darling *v.* Gunn, 50 Ill. 424; State *v.* Drake, 33 N. J. Law, 194; Cooley, Tax'n, 265."

And in Stuart *v.* Palmer, 74 N. Y. 183, it was held that a law imposing an assessment for a local improvement without notice or an opportunity to be heard, on the part of the owner, has the effect to deprive him of his property without "due process of law," and is unconstitutional. EARL, J., who delivered the opinion of the court, said: "I am of opinion that the constitution sanctions no law imposing such an assessment, without notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact, been fairly apportioned. The constitutional validity of a law is to be tested, not by what has been done under it, but what may, by its authority, be done. The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

Even where neither the city ordinance nor the state laws require that property owners be given notice of, and an opportunity to be heard against an assessment, an assessment made without such notice and opportunity is made without due process of law, and is void. Murdock *v.* City of Cincinnati, 39 Fed. Rep. 891.

And the cases holding that express notice is not essential are those in which the determination of the proper amount did not require the exercise of judicial discretion; but involved merely a mathematical calculation; or those in which the property owner received constructive notice, from the passage of the ordinance providing for the improvement, or otherwise. Gillette *v.* City of Denver, 21 Fed. Rep. 822; Palmyra *v.* Morton, 25 Mo. 593; Works *v.* Lockport, 28 Hun (N. Y.) 9; Finnell *v.* Kates, 19 Ohio St. 405; Cleveland *v.* Tripp, 13 R. I. 50; Galveston *v.* Heard, 54 Tex. 420; Highland *v.* Galveston, 54 Tex. 527; Adams *et al. v.* Fisher (Tex. 1885), 14 Am. & Eng. Corp. Cas. 330.

Necessity of Notice after Neglect of Property Owner to Lay Sidewalk.—In State *v.* Commissioner of Highways, etc. (N. J.), 29 Atl.

Notes

Rep. 429, it appeared that a special charter of the township of Cranford provides that whenever a petition signed by the owners of one half the lineal feet upon one side of a portion of a road, requesting that the side walk on that side of the portion of the street shall be laid in a certain manner, shall be presented to the board of road commissioners, then the property owners on that side shall be required to improve the sidewalk in the manner mentioned; it further provides that in default of any owner making such improvement within 30 days after notice, the board should do the work and assess the expense upon the owners. And it was held that, when the statutory conditions exist, the duty of the board to require the owners to improve, or, upon neglect of the owner to do the work, to have it done, is purely ministerial. Property owners are not entitled to notice or to a hearing previous to the execution of such a duty.

And where the property owner has refused to pay the expense of an improvement in front of his property, a subsequent assessment for such improvement is not invalid merely because the statutes providing for such assessments contain no provision as to the manner in which notice shall be given. Richter *v.* New York (Sup. Ct.), 54 N. Y. Supp. 150.

Reassessment.—Where a special assessment is set aside by a city council, and the taxes reassessed upon the same district, the land owners cannot complain of a want of notice of the orignal assessment in a suit to enjoin the collection of the reassessed taxes. Townsend *v.* City of Manistee, 88 Mich. 408.

Hearing as to Apportionment Sufficient.—A law which imposes a a tax or assessment to raise money for expenses of a public improvement, leaving the amount to be raised to be determined by commissioners, even without given a hearing to parties interested to oppose, but which does give them a hearing as to apportionment, is not unconstitutional. Spencer *v.* Merchant (N. Y.), 11 Am. & Eng. Corp. Cas. 443.

Where Notice Provided for in Charter.—In Grand Rapids School Furniture Co. *v.* City of Grand Rapids, 92 Mich. 564, it was held that a statute providing for an assessment, in accordance with the provisions of a city charter for assessing the expenses for street-grading, was not defective as not providing for notice, where proper notice was provided for in the charter.

SUFFICIENCY OF NOTICE.

Mode Specified by Law Must be Followed.—The nature of the notice and the way in which it must be given are generally provided for by statutory enactments; and they must be strictly pursued, or the assessment proceedings will be void. Lyon *v.* Alley, 130 U. S.

Notes

177, 27 Am. & Eng. Corp. Cas. 99; Hewes *v.* Reis, 40 Cal. 255; Chase *v.* City Treasurer (Cal.), 55 Pac. Rep. 414; Lent *v.* Tillson, 72 Cal. 404, 19 Am. & Eng. Corp. Cas. 640; Mayor, etc., of Baltimore *v.* Johnson, 62 Md. 225; Hildreth *v.* Lowell (Mass.), 11 Gray, 345; Northampton *v.* Abell, 127 Mass. 507; Fitchburgh R. *v.* Fitchburgh, 121 Mass. 132; Williams *v.* Detroit, 2 Mich. 560; Risley *v.* St. Louis, 34 Mo. 404; State *v.* Jersey City, 24 N. J. L. 662; State *v.* Plainfield, 38 N. J. L. 95; State *v.* Mayor, etc., of Bayonne, 49 N. J. L. 311; *In re* Burmeister (N. Y.), 56 How. Pr. 416; Hawthorne *v.* Portland, 13 Or. 270; Ladd *v.* Spencer (Ore.), 31 Pac. Rep. 474; Simmons *v.* Gardner, 6 R. I. 255; Adams *v.* Clarksburgh, 23 W. Va. 203.

SUFFICIENT NOTICE—ILLUSTRATIONS.

Chargeable with Notice of Public Laws and Progress of Work.—A city charter which provides that whenever any street shall be opened, graded or paved, or any other public improvement made, the city council may apportion the expense between the city and the owners of the real estate benefited thereby, and may order that the whole expense shall be borne by the owners of such real estate, but that the improvement shall not be made except upon the petition of a majority of the owners of such real estate, or unless, in ordering such improvement, three-fourths of the council shall concur, is not invalid under the fourteenth amendment to the federal constitution because it does not provide for notice to the owners of the assessment against them, the property owners being chargeable with notice of the public laws and all possible notice of the improvement being given by the progress of the work itself. Davis *v.* City of Lynchburg, 84 Va. 61. LACEY, J., in delivering the opinion of the court, said:

"It is claimed that the fourteenth amendment to the constitution of the United States invalidates the ordinance, and everything which has been done under it because the ordinance does not provide that the owners shall be served with notice of the assessment and given a time and a place to show cause against it. There are decisions cited by the learned counsel for the plaintiff in error which seem to hold these views. Stuart *v.* Palmer, 74 N. Y. 188; Santa Clara Co. *v.* Southern Pac. R. Co., 18 Fed. Rep. 385, 13 Am. & Eng. R. Cas. 182; Mulligan *v.* Smith, 59 Cal. 206; Gatch *v.* Des Moines, 63 Iowa 718, 3 Am. & Eng. Corp. Cas. 622; Brown *v.* Denver, 7 Colo. 305, 3 Am. & Eng. Corp. Cas. 630. But as an original question it is obvious that all possible notice is given by the progress of the work itself, and under our system of laws every citizen is held charged with notice of the public law."

Notes

Ordinance Reported.—Notice to property owners of a proposition to pave a street by assessment on abutting property, and an opportunity to be heard upon the general proposition as well as upon the question of the kind of pavement to be made, are sufficient under Pennsylvania Act of April 3, 1851, without specific notices after the several formal ordinances are reported. Beaumont *v.* City of Wilkes Barre, 142 Pa. St. 198.

Omission of Owner's Names and Description of Property.—It was held in Kansas City *v.* Ward, 134 Mo. 172, 35 S. W. 600, that a published notice to the property owners of the district to be assessed was sufficient, although it did not contain the names of the property owners, nor a particular description of the property to be charged with the expense.

Mistake as to Ownership.—Notice to an estate, per the widow of deceased, is not fatally defective, although the widow owned the property to be affected by the improvement in her own right. Pittsburgh *v.* Fay, 8 Pa. Super. Ct. 269.

Reference to Resolution of Intention for Details.—In Perine *v.* Erzgraber (Cal., April 19, 1894), 36 Pac. Rep. 585, it was held that a notice of street improvement which recites the passage of a resolution of intention providing for the laying of curbs and of sidewalks, and refers to the resolution for further particulars, sufficiently complies with the statute of 1889, page 157, sec. 2, requiring that such a notice shall state the character and locality of the work to be done.

Sufficiency of Diagram.—In McDonald *v.* Conniff (Cal., Aug. 30, 1893), 34 Pac. Rep. 71, it was held that a diagram need not show on what portion of a certain street the work of improvement was done, under the statute which provided that a diagram should be attached to the assessment, "exhibiting each street on which any work has been done, and showing the relative location of each lot to the work done, numbered to correspond with the numbers in the assessments, and showing the number of feet fronting, or number of lots assessed for said work."

Notice by Publication.—Where notice by advertisement and publication is specified by law, such notice is sufficient. Dubuque *v.* Wooten, 28 Iowa 571; State *v.* Elizabeth, 42 N. J. L. 56; Petition of De Peyster, 80 N. Y. 565; State *v.* Road Commissioners, 41 N. J. L. 83; State *v.* Plainfield, 38 N. J. L. 95; State *v.* Jersey City, 24 N. J. L. 662.

Failure to Publish in Sunday Edition.—The fact that notice of an assessment for city improvements is not published during the time required in successive numbers of a paper designated as the official paper of the city, but is omitted on Sunday, does not invalidate the assessment, where it appears that the week day edition is the official

Notes

paper, and that the Sunday edition, although numbered consecutively with the week day edition, is furnished and sold under different terms. Voght *v.* City of Buffalo (N. Y., June 7, 1892), 31 N. E. Rep. 340.

Change in Name of Paper.—A change in the name of the newspaper during the publication of the notice of a proposed improvement is immaterial, where the volume and numbers of tbe paper are not changed. Clinton *v.* City of Portland (Or.), 38 Pac. Rep. 407.

Publication and Posting—Statutory Requirement—"And" Construed to Mean "Or."—In Washburn *v.* Lyons, 97 Cal. 314, it was held that under the act of 1885, page 147, as amended by laws of 1889, page 157, providing that before ordering work to be done or improvements made a city council shall pass a resolution of intention so to do, which shall be published and posted for two days in the manner prescribed by sec. 34 of the act of 1885, does not require that the resolution itself shall be posted as well as published, since reference to section 34 and to the subsequent part of section 3 of the same act clearly show that "published and posted," as used in the requirements, should be construed "published or posted."

Size of Type.—In Williams *v.* Bisagno (Cal., Oct. 18, 1893), 34 Pac. Rep. 640, it was held that a statutory requirement that the letters in a "notice of street work" should be "an inch in length along the line" was sufficiently complied with by having the letters an inch in length vertically, so prominent as to attract attention, and so distinct as to be easily read at a reasonable distance.

Length of Notice.—If full fifteen days' notice of the time and place of the meeting of the board of public works to make the assessment and award of benefits and damages is given before the meeting, and near enough to the date thereof to reasonably answer the purpose designed, it is sufficient, although the date of the first publication is more than fifteen days before the meeting. Orders of the city council to the board of public works are merely directions to an executive department of the city government, and do not come within the provision of the charter requiring ordinances, resolutions, and by-laws to be published in the city paper before they shall take effect. Fairchild *v.* City of St. Paul, 46 Minn. 540.

INSUFFICIENT NOTICE—ILLUSTRATIONS.

Insufficient Specifications.—In Ladd *v.* Spencer (Oreg., Nov. 14, 1892), 31 Pac. Rep. 474, it was held, under a city charter providing that the common council shall cause a notice of contemplated street improvements to be published, which "must specify with convenient certainty the street or part of street proposed to be improved, and the kind of improvement to be made," that a notice stating that a certain street would be paved "by building at the established grade an elevated

Notes

railroad 36 feet wide," and an elevated sidewalk 12 feet wide, was not a compliance with the charter, since it did not sufficiently inform the abutting owners of the character of the proposed improvement, nor of its probable cost; *held*, also, that any proceedings under such notice were void.

Not in Proper Newspaper.—Under a statute providing that the notice shall be published in a newspaper selected by the council, a publication in a paper other than that specified in the ordinance declaring the intention to order the improvement is a fatal noncompliance with the statutory requirement. Chase *v.* City Treasurer (Cal.), 55 Pac. Rep. 414.

Insufficient Publication.—The failure of the board of supervisors to publish for the length of time required by law a resolution of intention to do specified street work renders an assessment for such work void, and a sheriff's deed given under a foreclosure of the lien is invalid, and vests no title in the purchaser. Brady *v.* Burke, 90 Cal. 1.

Publication of Ordinance with Failure to Publish Resolution.—In Michigan Central R. Co. *v.* Huehn (U. S. Cir. Ct. Ind., Jan. 22, 1894), 59 Fed. Rep. 335, it was held that under an act providing that whenever municipalities shall deem it necessary to make any street improvements the council shall declare by resolution the necessity therefor, and shall state the kind, size, location, and designate the terminal points thereof, and that notice of such resolution shall be given by publication is mandatory, and the statute is not complied with by the naked publication of an ordinance authorizing proposed work where there has been no declaratory resolution or prior notice.

WAIVER AND ESTOPPEL.

Notice, or defects therein, may be waived by the property owner. Murdock *v.* City of Cincinnati, 44 Fed. Rep. 726; Zeigler *v.* People, 164 Ill. 531, 45 N. E. Rep. 965; Walker *v.* City of Aurora (Ill.), 29 N. E. Rep. 74; Walters *v.* Town of Lake, Ill. Sup. Ct., 1889; Murphy *v.* Peoria, 119 Ill. 509; State *ex rel.* Chapin *v.* District Court of Ramsey Co., 40 Minn. 5.

Waiver of Defects by Appearance.—In Walker *v.* City of Aurora (Ill., Jan. 18, 1892), 29 N. E. Rep. 74, it was held that, where property owners specially assessed for a proposed sewer, appear at the time fixed for the filing of objections to the assessments and make a contest upon the merits of the case, this is a waiver of all irregularities and defects in respect to notice of assessments.

And it was held in Walters *v.* Town of Lake, Ill. Sup. Ct., 1889, that by voluntarily appearing in court and filing objections to the confirmation of the assessment roll for a local improvement, land owners

Notes

thereby waived all defects in the notice required by statute. See also Murphy *v.* Zeoria, 119 Ill. 509. And see Zeigler *v.* People, 164 Ill. 531, 45 N. E. Rep. 965, where it was held that a general appearance by the property owner upon an application for a judgment for the sale of his property for failure to pay a special assessment waived all defects in the notice. See also Stephens *v.* Com'rs of Leavenworth Co., 36 Kan. 664.

Waiver by Petitioning for Improvement.—In Murdock *v.* City of Cincinnati, 44 Fed. Rep. 726, it was held that an owner of land abutting on a street, by petitioning for its improvement, and agreeing, not only to pay his own assessments, but also to answer for any deficiency in the collectibility of the assessments against other abutting owners, waives his right to notice or an opportunity to be heard before the assessments are levied; and the proceedings of the city authorities, who levied the assessment in the exercise of the power conferred on them by law, and in compliance with the petition, cannot afterwards be impeached by such abutting owner, as being without due process of law, for the lack of such notice or an opportunity to be heard.

Voluntary Payment.—Where the board of public works of the city of St. Paul makes an assessment of benefits and damages to property resulting from a change of grade of a street, finding the benefits greater than the damages, and the property owner voluntarily pays the balance or difference collectible from him, he thereby acquiesces in the assessment, and waives the omission to publish the notices of the completion and confirmation of the assessment, and cannot interpose such omission as an objection to an assessment subsequently made against his property for grading the street in accordance with the changed grade. State *ex rel.* Chapin *v.* District Court of Ramsey Co., 40 Minn. 5.

Estoppel.—Property owners who had actual notice of a proposition to pave a street, and who have objected to the assessement therefor on other grounds, are estopped from asserting, in a suit brought by them for an injunction, that the formal notice served upon them was too remote in point of time. Beaumont *v.* City of Wilkes Barre, 142 Pa. St. 198.

And where the property owner knew that the construction work was in progress, and that his property was to be assessed for its payment, he, after receiving the benefit of the improvement, is estopped to deny the sufficiency of the notice given by the city council. Crawfordsville Music Hall Ass'n *v.* Clements (Ind. App.), 38 N. E. Rep. 226. See also Wilson *v.* City of Salem (Or.), 34 Pac. Rep. 9, 691.

CITY OF NORFOLK

v.

YOUNG *et al.*

(*Supreme Court of Appeals of Virginia, Jan. 18, 1900.*)

Local Assessments—Notice—Sufficiency.*—The charter of a city provided that no public improvement shall be made to be defrayed by local assessment except upon petition signed by a majority of the owners of the property to be assessed, or upon a resolution of expediency by a majority of the council, and that the council "shall furthermore give public notice of such resolution in two or more newspapers published in said city for twenty days." *Held*, that the notice provided for was not sufficient, no provision being made for giving notice to non-petitioning landowners where an assessment was made under the first method, and the notice provided for not being such that persons of ordinary intelligence could understand when, where and before whom they had the right to appear to protest against the assessment.

APPEAL from Norfolk city circuit court. *Affirmed.*

W. H. Taylor, for appellant.
Borland & Willcox, for appellees.

BUCHANAN, J. It was held in the case of Violett *v.* City of Alexandria, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, and may now be regarded as the settled law of this state, that local assessments by municipal corporations for street improvements are an exercise of the taxing power of the state, that article 14 of the amendments to the constitution of the United States applies to such assessments, and that a law which authorizes them, without giving to the person of whom such assessments are exacted reasonable notice and opportunity to appear and contest the legality, justice, and correctness of the assessment before it is finally determined

*See Gleason *v.* Waukesha County *et al.* (Wis.), *ante*, p. 385 and *notes*, p. 396 *et seq.*

upon, deprives such person of his property without due process of law, and is therefore void. It was further held that "due process of law" requires that a person shall have reasonable notice, and a reasonable opportunity to be heard before an impartial tribunal, before any final order can be made affecting his rights of property, and that such notice and opportunity must be provided for in the laws under which the assessment is made. Heth *v.* City of Radford, 96 Va. 272, 31 S. E. 8.

The local assessment complained of in this case, and whose constitutionality is denied, was made under the twenty-fifth section of the charter of the city of Norfolk, which provides that: "Whenever any street shall be laid out, a street graded or paved, a culvert built, or any other public improvement whatsoever made, the city councils may determine what portion, if any, of the expense thereof ought to be paid from the public treasury, and what portion by the owners of real estate benefited, or may order and direct that the whole expense be assessed upon the owners of real estate benefited thereby. But no public improvement shall be made to be defrayed, in whole or in part, by a local assessment, until first requested by a petition signed by a majority of the owners of property to be assessed for such improvement, or unless the councils shall by a vote of a majority of all the members elected to each council, declare the said improvement to be expedient; and shall furthermore give public notice of such resolution in two or more newspapers published in said city for twenty days, and shall thereafter by a like majority vote, order and determine that the said improvement shall be made." Acts 1883–84, p. 38.

That section limits the manner in which local assessments can be made. It can only be done upon the petition of a majority of the owners of property to be assessed for the improvement, or by a resolution, passed by a majority vote of all the members of each council, that it is expedient to make the improvement. This resolution of expediency must be published for 20 days in two or more newspapers

published in the city; and after such publication has been made the councils, by a like majority vote, can determine that the improvement shall be made. The assessment in this case was made under the latter method. The question presented, therefore, is whether the notice required by that section was intended to give the persons to be affected an opportunity to contest the legality, justice, and correctness of the assessment, and, if so, whether it was sufficient.

We do not think that the notice required by that section was intended to furnish the landowners to be affected an opportunity to contest the legality, justice, or correctness of the assessment. If it had been, there would have been a like provision for notice to the landowners who had not petitioned for the improvement, when the improvement was made upon the petition of a majority of the landowners to be assessed for such improvement. Those landowners who had not petitioned for the improvement, if not all to be affected by it, were entitled to an opportunity to be heard, just as much as where the improvement was made by the other method. Why give one class of persons notice and an opportunity to be heard, and not give another class equally entitled to it, when both classes are embraced in the same section—indeed, in the same sentence—of the charter? It cannot be presumed that the legislature had in mind the constitutional rights of the parties to be affected by such assessments, and intended to guard those rights as to one class, and to ignore or disregard them entirely as to the other class.

If the object of the provision in question had been to give the landowners an opportunity to contest the legality, justice, or correctness of the assessment, it would be reasonable to expect that provision would have been made for a tribunal before which, a place where, and a time within which, they could and must make the contest, but nothing of the kind is done.

The object of the provision was manifestly to enable the councils to get the benefit of the judgment or opinion of the

landowners to be affected, as to the necessity or wisdom of making the improvement.

When an improvement is ordered to be made upon petition, the petition furnished the councils with the views and wishes of a majority of those to be affected. When the improvement is made by resolution of expediency, the notice required is to give the people to be affected an opportunity to be heard as to the expediency of making the improvement, and thus to enable the councils the better to determine whether or not the proposed improvement should be ordered. But if the notice was intended to give the persons to be affected an opportunity to contest the legality, justice, and correctness of the assessment, we do not think it was sufficient. The object of notice in such cases is to secure to the owner the opportunity to protect himself or his property from an illegal or erroneous assessment. In order to be effectual, it should be full and clear enough to disclose to persons of ordinary intelligence, in a general way, what is proposed, and when and where they may be heard.

In the case of County of Santa Clara *v.* Southern Pac. R. Co. (C. C.), 18 Fed. 410, MR. JUSTICE FIELD, whose language is quoted by this court with approval in the case of Violett *v.* City of Alexandria, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, said: "The notice to which we refer need not be a personal citation. It is sufficient if it be given by a law designating the time and place where parties may contest the justice of the valuation. As a general rule, only a statutory notice is given. All that we assert, or have asserted, is that there must be a notice of some kind which will call the attention of the parties to the subject, and inform them when and where they will be permitted to expose any alleged wrong in the valuation of which they may complain."

And in the case of Bellingham Bay & B. C. R. Co. *v.* City of New Whatcom, 172 U. S., at page 318, 19 Sup. Ct. 206, 43 L. Ed. 462, it was said by MR. JUSTICE BREWER that if the service is made by publication only, as in this case, "that publication must be of such a character as to create a reason-

able presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed, and when and where he may be heard." Violett *v.* City of Alexandria, *supra*; Heth *v.* City of Radford, *supra*.

The notice required and given wholly failed to designate a tribunal before which, a place where, or a time when, the party to be affected had the right to appear to expose any alleged wrong in the assessment imposed upon him or his property.

Neither do we think that persons of ordinary intelligence would have inferred from the notice required and given that they had the right (even if that be the law, as appellant's counsel insists) to appear before the town councils at one of their regular meetings, and demand a hearing from them, in order that they might have any wrong done them redressed. Persons skilled in the law might have advised such a course. but the notice which the law requires in such cases is such that persons of ordinary intelligence may understand when, where, and before whom, they have the right to appear to protect themselves from illegal or erroneous assessments, without being compelled to employ attorneys to determine these questions for them.

I am of opinion that there is no error in the decree appealed from, and that it should be affirmed.

NORTH SPRINGS WATER CO.

v.

CITY OF TACOMA.

(*Supreme Court of Washington, Oct. 8, 1899.*)

Water Supply—Authority of City—Construction of Charter.—Where a city is granted the right to construct water works, or to authorize the construction of the same by others, the grant must be

construed to authorize the city to employ either method, or both methods at once, unless such construction would defeat the obvious intention of the legislature.

Same—Franchise—Contract Obligations.*—A city having the right to construct and operate a water system, and to authorize the construction and operation of water systems by others, granted to a private corporation the privilege of operating a water system but the ordinance granting the franchise did not make it, either expressly or by implication, an exclusive privilege, or expressly or by necessary implication bind the city not to erect and operate water works. *Held*, that such franchise was not a contract preventing the city from operating a water system in competition with that of the private corporation.

APPEAL by plaintiff from Pierce county superior court. *Affirmed.*

Charles S. Fogg, for appellant.

W. H. Pritchard and *Walter M. Harvey*, for respondent.

REAVIS, J. Bill in equity by the North Springs Water Company, a corporation, against the city of Tacoma, a municipal corporation, to enjoin the city from extending its water system in that part of the city of Tacoma situated in sections 24 and 25, and in what is known as "Old Tacoma," and where the plaintiff owns a plant and has its mains and pipes, and is supplying water to the inhabitants, or most of them, of the area designated. The facts are substantially as follows: Plaintiff (here appellant) is the owner of certain springs of fresh water in the northwestern part of Tacoma, and owns and operates a system of water works, by means of which it conveys the water flowing from the springs to the city, and to its inhabitants living in that vicinity. This system was constructed and operated by plaintiff and its grantors under franchises granted by the respondent city. The construction of the works was begun in 1890, and the franchise or right is claimed under Ordinance No. 350 of the city of Tacoma, approved September 8, 1890. The material portions of the ordinance are as follows: "Section 1. That R. B. Mullen

Case Stated.

*See notes at end of case.

and his assigns are hereby granted the right, privilege, and authority of erecting and maintaining water works in that part of the city of Tacoma, in the county of Pierce, and state of Washington, which is known and described as sections twenty-four (24) and twenty-five (25), in township twenty-one (21) north, of range two (2) east of the Willamette meridian, and of supplying that part of said city and its inhabitants with pure and fresh water, for which the said R. B. Mullen and his assigns are hereby authorized to charge the consumers thereof reasonable rates. Sec. 2. That for the purpose aforesaid the said R. B. Mullen and his assigns are hereby granted the right, liberty, and privilege of laying down, relaying, connecting, disconnecting, and repairing such and so many pipes along, through, and under the avenues, streets, lanes, alleys, and public highways and public parks and ground of said part of said city of Tacoma as may be necessary, proper, and convenient for supplying the said part of said city and the inhabitants thereof with pure and fresh water, and for that purpose to make connections between the street mains and pipes and the dwellings or other buildings or structures of the consumers." "Sec. 5. The city council hereby reserves the right to regulate by ordinance and fix the charges of said company to the consumers for the water privileges. Sec. 6. The council reserves the right to amend this ordinance any time in its judgment it deems it necessary." "Sec. 8. The rights, privileges, and authority granted in this ordinance shall continue for 25 years." Sections 3 and 4 relate to the method of laying the mains and pipes under the regulations of the city. By section 7 the city council reserves the right to order mains where in its judgment it is deemed necessary. The above ordinance (No. 350) was amended by Ordinance No. 368 on the 11th day of October, 1890, by repealing sections 5 and 8 thereof, and amending section 5 to read as follows: "Sec. 5. The city council of the city of Tacoma hereby reserves the right to regulate by ordinance and fix reasonable charges which said company may charge to the consumers for water

privileges,"—and amending section 8 to read as follows: "Sec. 8. The right, privilege, and authority granted in this ordinance shall continue for thirty years." On the 18th of October, 1890, a charter was adopted and officers thereunder elected by the city of Tacoma under the act of the state legislature entitled, "An act to provide for the government of cities having a population of twenty thousand or more inhabitants and declaring an emergency to exist," approved on the 24th day of March, 1890. Section 52 of the charter provides: "To provide for erecting, purchasing, appropriating or otherwise acquiring water works, gas works or electric light plants, within or without the corporate limits of said city, to supply said city and its inhabitants with water and light, or to authorize the construction of same by others, and to regulate and control the use and price of the water or light so supplied." Section 203 of the charter contains the following provision: "The city shall have the right to condemn and appropriate any water works, gas works, electric plant, street railway, for the purpose of managing, operating and controlling the same by the city, and all such appropriations shall be made as provided in this article, except that, before passing the resolution provided for, the city council shall first submit to the qualified electors of the city the proposition so to appropriate or condemn said property, and if a majority of votes cast be in favor of appropriation and not otherwise, such resolution shall be passed and such proceedings taken; said vote to be taken at a general or special election." Section 218 provides as follows: "When water is supplied by any person or corporation to said city or to any department, it shall not be paid for at more than the rate established by the city council." The city charter under which the franchise to appellant was granted was enacted by the legislative assembly of Washington territory on the 4th of February, 1886. Subdivision 5 of section 48 thereof contains, among other things, in defining the powers of the city government, the following: "To purchase or condemn, enter upon and take

any lands, water works, or gas works within the corporate limits for public use and for public squares, streets, wharves, docks, parks, commons, cemeteries. * * *" Subdivisions 7 and 8 are as follows: "Seventh—Water Works. To erect and maintain water works within or without the city, or to authorize the erection of the same for the purpose of furnishing the city with a sufficient supply of water; but no such works shall be erected by the city until a majority of the voters of the city, at a general or special election, assent thereto, and has power to and are hereby authorized to condemn and appropriate so much private property that shall be necessary for the construction and operation of said gas works or water works within the city limits, the appropriation to be made as provided by chapter twelve of this charter. Eighth. Franchises—Length of. When the right to build and operate such works is granted private individuals or incorporated companies by said city, they may make such grant inure for a term of not more than fifty years and authorize such individuals or company to charge and collect from each person supplied by them such water rents as may be agreed upon between said person and corporation so building said works; and said city is authorized and empowered to enter into a contract with the individuals or company constructing and operating said works to supply said city with water for such purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties. Nothing herein contained shall be construed to interfere or abridge the right and powers of the city council to regulate and fix the rate of compensation as provided by subdivision twenty-five of section forty-eight of this charter." Authority was also given to regulate and fix from time to time rates of compensation which might be charged and collected by any person or corporation for water or gas furnished within the city limits. Section 8, art. 1, of the constitution of Washington, in effect in 1889, is as follows: "No law granting irrevocably any privilege, franchise or

immunity shall be passed by the legislature;" and section 12 of the same article declares: "No law shall be passed granting to any citizen, class of citizens or corporation other than municipal privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." On the 12th of November, 1875, the legislative assembly of Washington territory passed a special act incorporating the city of Tacoma, which is now a part of the city respondent, and on the 5th of November, 1883, an ordinance (No. 26) was passed by said city of Tacoma granting to one Fuller the right and privilege of conducting water into the city of Tacoma (Old Tacoma), and through the streets and alleys thereof, for the purpose of supplying said city and its inhabitants with pure, fresh water. The charter of said city contains the following provision,—the authority under which said ordinance was adopted: "Sec. 6. The board of trustees shall have power to make such by-laws and ordinances not inconsistent with the constitution of the United States and the laws of this territory, as they may deem necessary to carry out the purposes of this act. They shall have power to prevent and remove nuisances; to prohibit disorderly conduct; to provide for licensing public shows and lawful games; to regulate and establish markets; to construct pumps, aqueducts reservoirs or other works necessary for duly supplying the city with water; to lay out, name, alter, keep open and repair the streets and alleys of the city; to provide such means as they deem necessary to protect the city from injury by fire." It does not appear that Fuller took any action under the rights and privileges granted him by the ordinance, but on the 27th of June, 1891, he executed to appellant's grantor "the right and privilege of conducting water into the city of Tacoma [Old Tacoma], and through the streets and alleys thereof, for the purpose of supplying said city and its inhabitants with pure, fresh water, and other purposes," and licensed and empowered his grantee, the grantor of appellant, to lay water pipes and conduct water through and along the streets and alleys of a

certain portion of the city of Tacoma for the purpose of supplying the city and its inhabitants with water and other purposes, and empowered appellant's grantor to use the franchise granted by Ordinance No. 26; and under this franchise appellant now furnishes water to another district in the respondent city, of limited area, commonly called "Old Tacoma." But the territory of the present respondent city was all embraced within one charter under the above act of the legislative assembly of Washington territory on February 4, 1886, and all ordinances not inconsistent therewith were continued in force. By Ordinance No. 32, approved June 9, 1884, the city of Tacoma granted the right and franchise of supplying the city with water and light—to said city and its inhabitants—to the Tacoma Light & Water Company, a corporation; and during a part of the year 1893, and prior thereto, this corporation supplied certain portions of the city of Tacoma, including the business part and a majority of the settled portions of the city, with water by means of a water system and plant owned and operated by the said Tacoma Light & Water Company. During the year 1893 respondent city purchased from the said Tacoma Light & Water Company its water plant and system, and the water company conveyed to the city of Tacoma, by deed, describing all of its real estate, reservoirs, machinery, water, and water rights, and also its franchises granted to it by the city under Ordinance No. 32; and since said purchase the respondent city has operated and carried on the business heretofore carried on by the Tacoma Light & Water Company. The appellant company has at all times since the construction of its works under Ordinance No. 358, above mentioned, operated and supplied the people in the district mentioned in the ordinance, and at all times possessed and enjoyed the privileges of the streets and alleys where its mains and pipes were placed; and said appellant has paid the municipal, county, state, and school taxes regularly assessed upon its property. It has also supplied from time to time the respondent city with water for city purposes in

such district, and been paid therefor. It was also found by the superior court "that the quantity of water supplied in said district by the plaintiff and its assignors has been and is inadequate and insufficient for the use of the inhabitants in that portion of the city of Tacoma hereinbefore described, in which plaintiff's water plant is situate, and has been and is insufficient for use by the city for extinguishment of fires and other municipal purposes." The twenty-fifth finding of fact made by the superior court is as follows: "That the defendant now proposes and has decided to extend its water mains and water system into the said territory, more particularly described in finding 26, now occupied and supplied with water for domestic and other purposes and uses by plaintiff herein, and is about to locate, lay down, and operate its water mains side by side on the same streets now occupied by plaintiff's said water mains, and to make the same accessible to each householder in said territory, and to furnish water for domestic and other purposes to the inhabitants of said territory in competition with the water so furnished by this plaintiff." Appellant has, from first to last, invested about $40,000 in its water system for supplying the people of the district mentioned with water.

1. Appellant maintains that the operation of the city's water system within the district that appellant has been supplying will injure, and may destroy, the value of its property, and that the franchises under which it is operating are contracts made with the city, and that the city, by its intended extension of its own water system, will become a competitor of appellant, and that such competition is a violation of the contract contained in the franchises granted by the city; and it invokes the protection of the state constitution and of the federal constitution (section 10, art. 1, and section 1, art. 14). It may be observed that Ordinance No. 358, granting the franchise to appellant's grantor, Mullen, was under the authority of the legislative charter of the territory of February 4, 1886, and also that the state constitution was

in effect at the time the ordinance was made. It would seem that the charter adopted by the freeholders of the city of Tacoma in 1890 has but little bearing upon the controversy. It is conceded by the learned counsel for appellant that the city was without power to grant any exclusive franchise to appellant; that, after appellant received its franchise, the same rights and privileges could be granted to any other person or private corporation. Indeed, it appears from the record that at the time appellant's grantor, Mullen, obtained the franchise to supply water in the certain district mentioned and in the city, a franchise to supply water and light to the city had theretofore been granted to the Tacoma Light & Water Company. Thus, at any rate, it was understood by all parties when Mullen obtained his franchise that he might meet the competition of other private water companies. The power granted to the city under the act of February 4, 1886, was to purchase or condemn water works or gas works within the corporate limits for public use; and subdivisions 7 and 8 of section 48 also authorized the city by ordinance to erect and maintain water works, or to authorize the erection of the same, for the purpose of furnishing the city with a sufficient supply of water. But no works could be erected by the city until a majority of the voters had assented thereto. When the right to build and operate such works was granted private individuals or companies by the city, the grant was limited to a term of not more than 50 years.

It is contended with much earnestness by counsel for the appellant that the grant to the city was to construct water works, or to authorize the construction of the same by others, that it was empowered to pursue either method in obtaining water works, and that the grant was in the alternative. Both methods, however, could not be employed at the same time. The same contention was made in the case of Thomas v. City of Grand Junction, before the court of appeals of Colorado. 56 Pac. 665. There the General Statutes (section 3312, subd. 67, as amended in 1893) authorized the city to purchase or erect water works, or to authorize the erection of the same,

and, in effect, are similar to the charter of respondent city. The court observed: "The contention of the plaintiff is that the word 'or,' as it appears in subdivision 67, is used in the disjunctive and alternative sense, and that, the city having elected to authorize the construction of water works for the supplying of water to the city and its inhabitants, its power in the premises was exhausted, and it has no power to construct water works of its own. The defendant city insists that the word is not used in such a sense, and that, if the contention of plaintiff be allowed, it would defeat the evident intent and purpose of the act, and would render it obnoxious to section 11, art. 2, of the state constitution, which provides that 'no law making any irrevocable grant of franchises, privileges or immunities, shall be passed by the general assembly.' It further contends that, to carry out the obvious purpose and legislative intent, the word 'or' should read 'and,' and that the judicial construction and interpretation should be that the city should be entitled to exercise all of the powers therein granted. We think that the contention of defendant is correct, and that it is fully sustained by reason and authority. It is a well-settled rule of statutory construction that all words and phrases used in a statute shall be understood and construed according to the approved and common usage of the language, and that some meaning shall be given to every word used. * * * It is equally, however, a well-settled rule of construction that, if no sensible meaning can be given to a word or phrase, or if it would defeat, manifestly, the real object of the enactment, it should be eliminated; also, that, for the same reason, words may be rejected as surplusage; also, to carry out the intention of the legislature, another word may be read for the word used, where the word used would manifestly defeat the legislative intent, and the substitution of the other would carry it out. These may be said to be exceptions to the general rule as above announced, but the exceptions, as will be seen by an examination of the authorities, are almost, if not quite, in as general use as the rule

itself. Especially with reference to the words 'or' and 'and' has it been frequently necessary to invoke this latter rule. As said by Mr. Sutherland: 'The popular use of "or" and "and" is so loose, and so frequently inaccurate, that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their accurate meaning is more readily departed from than that of other words, and one read in place of the other, in deference to the context.' Suth. St. Const. § 252. Mr. Endlich says: 'To carry out the intention of the legislature, it is occasionally found necessary to read the conjunctions "or" and "and" one for the other. Indeed, these words are said to be convertible into each other, as the sense of the enactment and the necessity of harmonizing its provisions may require.' End. Interp. St. § 303." In Thompson Houston Electric Co. *v.* City of Newton (C. C. Iowa), 42 Fed. 723, the facts were very similar to those in the case at bar. The complainant, a private corporation, obtained the right to erect, maintain, and furnish lights to private citizens, and also, by contract with the city, to furnish lights for the streets and public places of the city; and, while so performing its obligations under the franchise, the city determined to establish and maintain electric light plants, to be owned and operated by the city. The laws of Iowa (Acts 22d Gen. Assem. c. 11) enacted "that cities should have power to establish and maintain electric light plants, or to authorize the erection of the same"; and the contention was there made that the city had the option given it, and that it could originally have erected its electric light plant, but, having elected to authorize private parties to do so, it was estopped from afterwards entering the field as a competitor, and, while the light company did not have an exclusive right under its agreement with the city, yet the city should not be allowed to compete with a private company. MR. JUSTICE SHIRAS said: "It is doubtless true that, if the city enters the field by the erection of its own plant, it will have an advantage over the complainant; yet it does

not follow that the court can interpose and restrain the city from erecting the contemplated plant. As already stated, the city did not grant any exclusive rights to complainant; and the latter, when it erected its plant, took the chance as to future competition. * * * The statute confers the right so to do upon the city, and I can see no ground justifying the court in interposing by injunction, and preventing the city from establishing its proposed plant." It will be noted that the cases referred to above each answers the argument of the appellant. A case which also has much that is similar in the discussion is that of State *v.* City of Hamilton (Ohio Sup.), 23 N. E. 935, and also Hamilton Gaslight & Coke Co. *v.* Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90. Analogous reasoning is found in Long *v.* City of Duluth (Minn.), 51 N. W. 913; Long Island Water-Supply Co. *v.* City of Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718; State *v.* Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; Colby University *v.* Village of Canandaigua, 69 Fed. 671. While it is true that supplying water to the inhabitants of the city and to itself does not originate in an exercise of the ordinary police powers of a municipal corporation, yet in this state, since the territorial organization, and it may be also said that generally in this country, municipal charters very generally confer this power upon cities. The respondent city was authorized, under its charter of 1886, to supply itself and its inhabitants with pure, fresh water. In the exercise of this power, it could exercise a choice of modes. It could purchase or condemn any existing system, or it could grant the right to any person or corporation to lay mains and pipes and furnish water, or it could erect a system itself. There does not seem to be any prescription in its charter of the method, and there is no cogent implication that the city is restricted in its power to build and operate water works to any specific method. It would seem, therefore, that the city council could not absolutely bind the city in the future so that it could not exercise one of its specifically granted powers under its charter; and the well-known

and accepted rule, that in grants of this character doubts must be resolved in favor of the public, requires more than mere negation to infer that the council has attempted to estop the city from the fair exercise of such granted power. The familiar rule that a privilege creating a monopoly cannot be given without the grant from the sovereign, the legislature, has been extended in this state, and that power taken from the legislature by the constitution; and section 8 of article 1 of the constitution, *supra*, is also pertinent in considering the general policy of the state. We do not think the grant of the power to construct, or authorize others to construct, works to supply water to a city and its inhabitants, is in the alternative; but the original grant authorized it to provide water for the city, without limitation of the manner in which it may be done. It was observed by the supreme court of the United States in Hamilton Gaslight & Coke Co. *v.* Hamilton City, *supra*: "It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties." Again, it was observed by the same authority in Curtis *v.* Whitney, 13 Wall. 68: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation." Commenting upon this, the court, in Hamilton Gaslight & Coke Co. *v.* Hamilton City, *supra*, says: "If parties wish to guard against contingencies of that kind, they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants susceptible of

two constructions must receive the one most favorable to the public." So, if it be conceded that the respondent city was authorized by the terms of its charter to make a contract that it would not itself supply water to the inhabitants in the limited district where the appellant's mains and pipes were placed, it did not make such agreement. There are no words of exclusion in the privilege granted appellant by the ordinance. There are no words of limitation upon the right of the city. There apparently is no plain inference that can be raised from the ordinance that such was the intention of the parties. If such intention existed, it would doubtless have been expressed in the contract.

Same—Franchise—Contract Obligations.

2. Counsel for appellant relies upon two cases,—one of them, White *v.* City of Meadville (Pa. Sup.), 35 Atl. 695. But this case is readily distinguished from the one under consideration here. There, under the corporation act, water companies were authorized to supply cities with water; and provision was made for the purchase by the cities so supplied, at their option, after 20 years, of the plant of the company, at a price regulated by its net cost. Another act which the court construed in *pari materia* gave cities exclusive right to supply themselves with water, or to contract with any company for the erection of a water plant, and give it the exclusive right to furnish water to the city. Thus, the legislative grants authorized an exclusive contract between the city and the water company. The court observed, after citation and construction of the statutes: "Here, then, plainly, were two distinct methods by which the municipality could supply its citizens with water. By putting either method in operation the same end was accomplished. * * * The primary grant was the power to supply; the secondary one, the grant of two distinct methods of exercising the power, either of which might be adopted. There was no grant of power to put both methods in operation at the same time." It was also observed that the water company, by the terms of its charter, was authorized to make an exclusive contract. The other authority is an eminent one, and, upon the construction of the

principle of the federal constitution invoked by appellant, controlling: City of Walla Walla *v.* Walla Walla Water Co., 19 Sup. Ct. 77. But the facts before the court there are substantially variant from those in the case at bar. The special charter of the city of Walla Walla, by act of the territorial legislature, invested the city with power "to provide a sufficient supply of water," and "to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light or water, to any persons or associations of persons for a term not exceeding twenty-five years," provided "that none of the rights or privileges herein granted shall be exclusive, nor prevent the council from granting the same rights to others." It was also provided that the city of Walla Walla should have power to erect and maintain water works within or without the city limits, or to authorize the erection of the same, for the purpose of furnishing the city with a sufficient supply of water, and to enact all ordinances necessary to carry the power conferred into effect, but no water works should be erected by the city until a majority of the voters should vote for the same. It was also given power to purchase or condemn water works already erected, or which might be erected. Under the powers contained in its charter, on March 15, 1887, the city, by ordinance, granted, under certain restrictions, to the water company, for the period of 25 years from the date of the ordinance, the right to lay, place, and maintain all necessary water mains, pipes, connections, and fittings in all the highways, streets, and alleys of the city, for the purpose of furnishing the inhabitants thereof with water, and reserved the right to maintain as many fire hydrants as it should see fit, and all reasonable and necessary control of the water for the extinguishment of fires. The ordinance also provided that the city should pay to the water company, for the matters and things enumerated in the ordinance, quarter yearly, $1,500 per annum, for the period of 25 years after the date of the passage of the ordinance. The city was to have the right to flush any sewer

it had constructed, or might thereafter construct. It was further provided; "Sec. 7. For all the purposes above enumerated said Walla Walla Water Company shall furnish an ample supply of water, and for domestic purposes, including sprinkling lawns, shall furnish an ample supply of good, wholesome water, at reasonable rates, to consumers, at all times during the said period of twenty-five (25) years; and this contract shall be voidable by the city of Walla Walla, so far as it requires the payment of money, upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of said company to keep or perform any agreement or contract on its part herein specified or in said contract contained. But accident or reasonable delay shall not be deemed such failure. And until such contract shall have been so avoided, the city of Walla Walla shall not erect, maintain, or become interested in any water works, except the ones herein referred to, save as hereinafter specified. Sec. 8. Neither the existence of saidcontr act nor the passage of this ordinance shall be construed to be, or be, a waiver of or relinquishment of any right of the city to take, condemn, and pay for the water rights and works of said or any company at any time, and in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company." After this ordinance had been in force for about six years the city undertook to provide for the construction of a system of water works of its own for the purpose of supplying the city and its inhabitants with water. The water company filed a bill in equity to enjoin the city from proceeding to construct and operate these works. It was maintained by the complainant water company that the contemplated action of the city violated the contract contained in the ordinance granting to the water company the right to supply water. It was concluded by the court that the contract was not an exclusive

one, and did not grant a monopoly, and it was observed: "Particularly is this so when taken in connection with a further stipulation that the city shall not erect water works of its own. This provision is not devoid of an implication that it was intended to exclude only competition from itself, and not from other parties whom it might choose to invest with a similar franchise." And it was observed further: "Nor do we think the contract objectionable in its stipulation that the city would not erect water works of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect water works of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn, and pay for the water works of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That, if the city should desire to establish water works of its own, it would do so by condemning the property of the company, and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants, but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith." The controlling consideration seemed to be that the city was within its powers in making the contract with the water company; that it was incidental to the main power given the city to supply water; and from this conclusion it is apparent from the terms of the ordinance itself that the intended action of the city was a violation of the contract. In a case where the facts are closely analogous to those at bar (Westerly Water-Works Co. *v.* Town of Westerly, 80 Fed. 611), where the grant was made to a water company to use the highways so long as the inhabitants should be reasonably supplied with water,

exempting it from taxation 25 years, and exacting an obligation to supply water to the town and sell its works to the town, the town was not excluded from the right to construct water works of its own; and the court observed: "We think, therefore, that a sound distinction can be made between a grant or a contract which absolutely excludes all competition, and one which merely excludes the competition of the town until it shall make due compensation to the company." And referring to the case of Walla Walla Water Co. *v.* City of Walla Walla, *supra*, as reported in 60 Fed., at page 957, it is said: "The city in explicit terms agreed not to erect, maintain, or become interested in any other water works. * * * It is also stated that the city had bound itself to take over the plant and render just compensation whenever it did elect to furnish water by means of works owned by it. In the present case there is no express agreement that the town will not compete, nor that, in case it should elect to compete, it will purchase the works. Such agreement must be deduced from construction, and, in view of the rule that all doubt in the construction must be resolved against the company and in favor of the public, there is great difficulty in inferring such agreement." As before observed, the city of Tacoma, in the ordinance which conferred the franchise upon appellant, did not expressly or by necessary implication agree not to erect its own water works, and the circumstances surrounding the parties at the time were not such as to impel the inference that such contract was in contemplation by them. The judgment is affirmed.

GORDON, C. J., and DUNBAR and FULLERTON, JJ., concur.

NOTES.

Contract for Water Supply—Power of City.—The power of a city to contract for water supply may be given by general or special laws. Stimson's Am. Stat. Law, 102; State *v.* Crete (Neb.), 33 Am. & Eng. Corp. Cas. 615; Burlington Waterworks Co. *v.* Burlington, 43 Kan. 725, 34 Am. & Eng. Corp. Cas. 108; Wood *v.* National Waterworks

Notes

Co., 33 Kan. 590; Columbus Water Co. *v.* Mayor, etc., of Columbus (Kan.), 38 Am. & Eng. Corp. Cas. 149; Defiance Water Co. *v.* Defiance (C. C.), 90 Fed. Rep. 753.

A city may be granted express authority by its charter to contract for a water supply. Conery *v.* New Orleans Waterworks Co., 39 La. Ann. 770, 29 Am. & Eng. Corp. Cas. 323; City of Indianapolis *v.* Indianapolis G. L. & Coke Co., 66 Ind. 40.

Where the charter for a city declared in express terms that the common council should have authority to provide by ordinance for a supply of water for said city, a contract entered into for that purpose, pursuant to an ordinance duly passed, was not *ultra vires*. Atlantic City Waterworks Co. *v.* Atlantic City, 48 N. J. L. 378, 15 Am. & Eng. Corp. Cas. 327.

In default of legislation upon the subject or mention in the act of incorporation a city may contract for a water supply under the general authority usually conferred in municipal charters, such as the power to "pass all such orders, by laws and ordinances respecting . . . the police of said town as shall be necessary for the security and welfare of the inhabitants thereof, and for preserving health, peace, order, and good government within the same." City of Indianapolis *v.* Indianapolis G. L. & Coke Co., 66 Ind. 40.

Under the authority given to pass ordinances to protect the health of the citizens and respecting the police of the city, a city may contract to procure a water supply. Livingston *v.* Pippin, 31 Ala. 542; Indianapolis *v.* Indianapolis Gas. Co., 66 Ind. 396.

Likewise, under authority to make, "all contracts in its corporate capacity which may be deemed necessary for the welfare of the city, and which do not conflict with the constitution and laws of the Federal and State governments." Mayor & Council of Rome *v.* Cabot, 28 Ga. 50.

A city which, besides the power to provide for the health of its inhabitants, has an express power by its charter "to provide for the erection of water works for the supply of water to the inhabitants of the city," has power to contract with a corporation for the establishment and erection of water works to supply such inhabitants with water. Andrews *et al. v.* National Foundry and Pipeworks, Limited (C. C. A.), 48 Am. & Eng. Corp. Cas. 105.

Where a town has power under its charter to pass ordinances "to prevent and extinguish fires," it has power, as incident thereto, to contract for a supply of water for that purpose. Howsmon *v.* Trenton Water Co., 119 Mo. 304, 48 Am. & Eng. Corp. Cas. 94.

Under an act providing that a tax shall be laid and collected upon property, "sufficient to defray the ordinary expenses of said corporation," it has been decided that corporate authorities have the

Notes

power, as such, to procure a supply of water; and furthermore, being thus empowered, that they themselves are the best judges of the mode and manner by which the object should be accomplished. Livingston *v.* Pippin, 31 Ala. 542.

A borough has implied power to contract with others for public water and light, if it is unable or unwilling to furnish them itself, under Pa. act 1851, P. L. 320, § 2, empowering boroughs to light the streets and provide a supply of water for the use of the inhabitants. Hummelstown *v.* Brunner (C. P.), 5 Pa. Dist. Rep. 8, 17 Pa. Co. Ct. 140.

A contract by a city of the fourth class granting a specified person the exclusive right and privilege of supplying the city with water for twenty years, and providing that such contract shall remain in full force for an additional twenty years if the city had not purchased the works before the expiration of the first term, is valid for the original term of twenty years under Mo. Rev. St. 1889, § 1589, empowering such cities to make such a contract for the term of twenty years only. Neosho City Water Co. *v.* Neosho, 136 Mo. 498, 38 S. W. 89.

A city of the second class in Kansas has the right and the power to provide for supplying itself and its inhabitants with water. Burlington Waterworks Co. *v.* Burlington (Kan.), 34 Am. & Eng. Corp. Cas. 108.

In Kansas a city of the second class has authority to make provision to furnish water to the inhabitants and for fire protection; and such a city is authorized to grant a franchise to a person or corporation to establish water works, and is empowered to rent hydrants of such person or corporation. Columbus Water Co. *v.* Columbus (Kan.), 38 Am. & Eng. Corp. Cas. 149.

Under subdiv. 15, sec. 69, Chap. 14, Neb. Comp. St., a city of the second class has authority to make contracts with and authorize any person, company, or corporation to erect and maintain a system of water works and water supply, etc., for the city under certain rules and regulations. This, however, is not dependent on the rental of hydrants for the use of the city; that being a mere incident to the contract. State *v.* Crete (Neb.), 33 Am. & Eng. Corp. Cas. 615.

A city of the second class of less than 5,000 inhabitants may under the authority of Neb. Comp. St., Chap. 14, art. 1, § 69, enter into a contract for a water supply before making an appropriation to meet the agreed payment of water rentals, such contract being within the exception contained in § 89. North Platte *v.* North Platte Waterworks Co., 56 Neb. 403, 76 N. W. 906.

The city of New Orleans has the power to contract for a water supply under the provisions of its charter, and having this power to contract, the price, the kind of water, and the quantity are matters

Notes

of legislative discretion vested in the city council; and when the city confines herself within the limits of its power to contract, the discretion of the council will not be inquired into by the courts in the absence of fraud and corrupt and extravagant legislation, which are beyond the legitimate object and purpose of municipal government. Conery *v.* New Orleans Waterworks Co. (La.), 29 Am. & Eng. Corp. Cas. 323, 39 La. Ann. 770.

The New Jersey act of 1876 authorizes the city of Hoboken to contract with a water company within its limits for a supply of water for public and private use. Hackensack Water Co. *v.* Hoboken (N. J.), 24 Am. & Eng. Corp. Cas. 511.

In State (Conger, Pros'r) *v.* Summit Township, 52 N. J. L. 483, it was held that a township is not precluded from contracting for a water supply by the fact that the water so supplied is not carried to every part of the township.

A statute empowering a city to contract for the construction of water works with any person or company and lease such works from them, conveying any property of the city necessary for the construction of the works, is not within the provision of the Ohio Constitution forbidding any city to raise money for, or loan its credit to or in aid of, any such company, corporation or association. Ampt *v.* Cincinnati, 12 Ohio C. C. 119, 1 Ohio C. D. 356.

A water contract providing that the city shall pay the hydrant rentals to the bondholders of the company furnishing the water does not violate Act of Congress of 1886, § 2, forbidding territories and cities therein to subscribe to the capital stock of corporations or to loan their credit for the benefit of such company. State *v.* Great Falls, 19 Mont. 518, 49 Pac. Rep. 15.

The courts cannot circumscribe the power granted to a city by the legislature to provide a water supply. Atlantic City Waterworks Co. *v.* Atlantic City, 48 N. J. L. 378, 15 Am. & Eng. Corp. Cas. 327. See also Warren *v.* Chicago, 118 Ill. 329; Memphis *v.* Memphis Water Co., 5 Heisk. (Tenn.) 528.

It has been held that the waterworks committee of a city government, without special authority, has no power to bind the city by a contract for the introduction of a new and expensive improvement in a system of water works; for the power to make a contract of this nature, being equivalent, in general, to the power to levy and disburse taxes, must be exercised under a corporate act. Mayor and City Council *v.* Hogan, 9 Baxt. (Tenn.) 495.

An act authorizing municipal corporations to contract for a supply of water for public uses did not validate prior criminal arrangements entered into by municipal authorities for a water supply. Atlantic City Waterworks Co. *v.* Read (N. J.), 24 Am. & Eng. Corp. Cas. 562.

Notes

Same—Elections.—Without the preliminary sanction of a popular vote, as required by the constitution, a municipal corporation cannot contract for a supply of water on the credit of the city for a longer period than 1 year; and a contract which by its terms is to run for 20 years, each years' supply to be paid for semiannually from year to year, is operative from year to year, so long as neither party renounces or repudiates it. (a) Cartersville Improvement, Gas & Water Co. *v.* City of Cartersville, 89 Ga. 689, 16 S. E. 25; Lewis *v.* Lofley, 92 Ga. 804, 19 S. E. 57; Board Com'rs Habersham Co. *v.* Porter Mfg. Co., 103 Ga. 613, 30 S. E. 547; —followed and approved. Spain *v.* Board, 64 Ga. 498; Cabaniss *v.* Hill, 74 Ga. 845,—overruled in part. City Council of Dawson *v.* Dawson Waterworks Co. (Ga.), 2 Mun. Corp. Cas. 73.

In Lamar Water & Electric Light Co. *v.* City of Lamar (Mo.), 26 S. W. Rep. 1025, it was held that a statute (Rev. St., 1589), authorizing municipal authorities to contract by ordinance for a water supply when authorized by a two-thirds vote of the qualified voters of the city, does not require an election as a condition precedent to the passage of a valid ordinance.

Village trustees may contract for supplying the village with water without appropriating funds to pay therefor, under a provision of the village charter authorizing the board of trustees to contract for such water supply for not more than three years, and to insert the annual amount of the bill for water in the annual tax levy, without submitting it to a vote of the people, notwithstanding another provision of the charter that the village shall not incur any debt or liability beyond the amount of taxes applicable to the payment thereof. Port Jervis Waterworks Co. *v.* Port Jervis, 151 N. Y. 111, 45 N. E. 388.

Same—Duration of Contract.—A statute authorizing municipal authorities to contract for supplying the city with water from year to year authorizes a contract to extend twenty years from the time of making. Light, etc., Co. *v.* Jackson, 73 Miss. 538, 19 So. Rep. 771.

A city of the second class under the power given by Kan. Gen. St. 1889, ¶ 7185, to contract for and procure the construction of water works, may contract for such construction and lease of hydrants for a term exceeding the single year during which the members of its council hold office. Illinois Trust, etc., Bank *v.* Arkansas City (C. C. A.), 76 Fed. Rep. 271, 22 C. C. A. 171, 34 L. R. A. 518.

When a city of the second class has entered into a contract with a water company for water to be furnished it for fire protection, and a waterworks plant has been erected and maintained at great expense for a period of four years or more, and during that period the corporation owning the plant has furnished water, in accordance with a contract entered into and recognized by the city, and the city has

Notes

levied the proper tax, and paid hydrant rental for three years, and otherwise recognized the validity of such contract,—*held* that this court will not hold the contract void under the facts as stated in the petition, because the city did not possess the power to make a contract for the period of twenty-one years. While the city may be powerless to make a contract for the duration alleged, still the contract should be upheld for a reasonable time, when the circumstances and condition of the city as to the population and assessed valuation are substantially the same, and no better facilities are offered upon more reasonable terms. Columbus Water Co. *v.* Columbus (Kan.), 38 Am. & Eng. Corp. Cas. 149.

Where a municipality has the power to contract with a water company for the term of ten years, a contract to run twenty years would be void. State of Jersey *ex rel.* Davies *v.* Town of Harrison, 46 N. J. L. 79.

When the charter of a municipal corporation provides that the common council shall have no power "to contract debts, incur liabilities, or make expenditures in any one year which shall exceed the revenue for the same year, unless first authorized so to do by a majority vote of the taxpayers," a contract entered into without submitting the question to the taxpayers for a supply of water for a term of years, at a cost per year which would not exceed the authorized levy for past years, but the aggregate of which would exceed any such percentage as could be allowed in any one year, is void, and there can be no recovery thereon for any water that has been furnished thereunder. Niles Waterworks *v.* Niles, 59 Mich. 311, 11 Am. & Eng. Corp. Cas. 299.

A city may, under the laws of Pennsylvania, either contract with a private corporation for water or build its own water works, but, after it has selected one mode, cannot attempt the other, as long as the mode selected furnishes the supply according to law. Carlisle, etc., Co. *v.* Carlisle Water Co., 188 Pa. St. 51, 41 Atl. Rep. 321.

Same—Exclusive Privileges.—A city council has no right, unless duly authorized, to grant to any person or corporation a monopoly, even where no express prohibition is found in its charter or other acts of legislation; for, as it was observed by the court in a case of some note which involved a contract made by the city of Cincinnati with a gas company to run twenty-five years, "when a franchise so far in restraint of trade, and so pregnant with public mischief and private hardship, is drawn in question, and it is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. It must be found on the statute book in express terms, or arise from the

Notes

terms of the statute by implication so direct and necessary as to render it exceedingly clear." State *v.* G. L. Co., 18 Ohio St. 291; City of Brenham *v.* Brenham Waterworks, 67 Tex. 542, 20 Am. & Eng. Corp. Cas. 207; Westerly Waterworks Co. *v.* Westerly (C. C.), 80 Fed. Rep. 611; Greenville Waterworks Co. *v.* City of Greenville (Miss.), 7 So. Rep. 409; Syracuse Water Co. *v.* Syracuse (N. Y.), 29 Am. & Eng. Corp. Cas. 307; Thrift *v.* Elizabeth City Com'rs, 122 N. Car. 31, 30 S. E. 349; Long *v.* Duluth (Minn.), 38 Am. & Eng. Corp. Cas. 415; Norwich G. L. Co. *v.* Norwich City Gas Co., 25 Conn. 91.

Same—What Grants Confer Exclusive Privileges.—A grant of a franchise is to be so strictly construed as to operate as a surrender of sovereignity no further than is expressly declared by the language employed; and a franchise, therefore, will not be deemed to be exclusive, except in so far as it is expressly made so by the terms of the grant, and in the absence of express stipulation to the contrary the power is reserved to the grantor to permit the exercise of competing and rival privileges, however injurious they may be to those taken by the prior grantee. Syracuse Water Co. *v.* Syracuse (N. Y.), 29 Am. & Eng. Corp. Cas. 307.

A grant which gives one or an association of persons an exclusive right to buy, sell, make, or use a given thing or commodity, or to pursue a given employment, creates a monopoly. The exclusive right need not continue indefinitely so as to amount to perpetuity. It is sufficient that it is an exclusive privilege for a period of time of the character forbidden. So an ordinance granting the exclusive right to sell water to a community, for public and private uses, affects all of the inhabitants in their common rights directly, and is in conflict with that clause of the Texas constitution which provides that perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed. Brenham *v.* Brenham Water Co. (Tex.), 20 Am. & Eng. Corp. Cas. 207.

In Altgelt *v.* City of San Antonio (Tex.), 17 S. W. Rep. 75, it was held that a contract by which a city gave a water company the exclusive right to furnish the city with water for public purposes for twenty-five years at a fixed price per year was illegal, as creating a monopoly.

The grant by a city council of the exclusive right of selling to the city all the water required by it for sewerage and fire purposes for the period of twenty-five years at a minimum rate fixed in the contract is a monopoly, and this, though the grant does not prevent other people from selling water to private citizens. Davenport *v.* Kleinschmidt, 16 Am. & Eng. Corp. Cas. 301.

Where a company, holding a charter which granted it the exclusive right to pipe streets, sought to restrain a rival company from using

Notes

streets for the same purpose, it was held that the charter created a monopoly which was unconstitutional, and could not be sustained; for the authority to provide a city with water supply, and to make "reasonable regulations" with reference thereto, does not empower a city government to grant to one company the exclusive right to furnish water for thirty years. Norwich G. L. Co. *v.* Norwich City Gas Co., 25 Conn. 91; State *v.* Cin. G. L. Co., 18 Ohio St. 293.

Legislative authority to a municipal corporation to provide a system of water works, to grant the right to a private corporation to establish such a system, and supply the municipality with water and to contract therefor, does not confer upon the municipality the power to grant an exclusive franchise so as to disable the municipal corporation for the period of thirty years from itself establishing water works and a system of supply. Such grants or delegation of authority are to be strictly construed. Long *v.* Duluth (Minn.), 38 Am. & Eng. Corp. Cas. 415.

A grant by a city to a water company of the right to lay and maintain pipes for twenty-five years for the purpose of furnishing water to the citizens, the city stipulating not to construct water works of its own, does not create a monopoly nor prohibit the city from granting a franchise to another company. Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77.

A provision in the charter of a water company that the city may at the expiration of a period of 20 years acquire the water works, nor may take the same sooner in the event of the failure of the company to supply the city with water, does not impose upon the city any duty to refrain from obtaining a supply of water from another source, or from granting to another company the privilege of using the city streets for the laying of water-pipes. Syracuse Water Co. *v.* Syracuse (N. Y.), 29 Am. & Eng. Corp. Cas. 307.

The franchise conferred under the act of 1873 (ch. 737), as amended by the act of 1881 (ch. 213), which provides for the incorporation of water companies, is not exclusive, nor does it confer on such companies an exclusive or permanent right during their corporate existence to furnish water to the municipalities they were created to supply, and neither the statute nor the constitutional inhibition against the impairment of the obligation of contracts precludes the grant of a charter to another corporation which has obtained the requisite assent of a municipality authorizing it to supply water to the inhabitants thereof. *In re* City of Brooklyn, 143 N. Y. 596, 48 Am. & Eng. Corp. Cas. 37.

An exclusive right to supply water to a town is not acquired by a water company organized under a statute which simply provides for the organization of such companies, when its contract with the town

Notes

gives simply a privilege of laying its mains in the street, with a covenant for the payment of hydrant rentals, without any words of exclusion. Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718.

Where a water company was invested with the exclusive privilege of supplying water to the district covered by its charter, it was held that the right was exclusive only as against other water companies, and that its franchise would not prohibit the city or borough itself from providing its citizens with water by means of works constructed by itself; and that, while the construction of such works would impair the value of those belonging to the water company, its owners would have no legal cause of complaint. Lehigh Water Co's Appeal, 102 Pa. St. 575; Murphy *v.* Memphis Water Co., 5 Heisk. 5; Sedgwick on Statutory and Constitutional Law, 126–7; Anderson *v.* Weakley, Cooke's Rep. 410.

In a proceeding under the annexation act instituted by the city to acquire the property and franchise of the water company, the appraisers refused to consider that the right of the company to supply water was so exclusive as to preserve it from rivalry or action on the part of the legislature, and valued the franchise upon the assumption that at present the company alone had the right publicly to supply water to the territory which formerly constituted the town, but that the exclusiveness incident to its right might at any time be taken from it by the legislature or by the local authorities, which, in determining whether to do this, would fail to have due regard for the past investments, risks, and services of the company, and the reasonably just expectation of those who had invested therein. *Held*, that the action of the appraisers was proper. *In re* City of Brooklyn, 143 N. Y. 596, 48 Am. & Eng. Corp. Cas. 38.

A water company organized under the act contracted with a town for a water supply for a fixed term of years. *Held*, that in the absence of any prohibition contained in the contract, whereby the town was precluded from making a contract with another corporation for a supply of water, there was nothing to prevent such new contract if the public needs required such additional supply. *In re* City of Brooklyn, 143 N. Y. 596, 48 Am. & Eng. Corp. Cas. 37.

A contract with a municipal corporation, whereby the corporation grants to a certain party the exclusive right of supplying water for a period of years to the inhabitants of a city from a designated source, is not impaired by a grant to another party of a privilege to supply water from a different source. Stein *v.* Bienville Water Supply Co. (U. S.), 34 Am. & Eng. Corp. Cas. 97.

A city cannot erect a competing plant of its own, where a water company has contracted with it to furnish a water supply, under the

Notes

Pennsylvania act of April 29, 1874, providing for water companies and giving the municipality the right of purchasing the plant after twenty years, such destruction of the value of the franchise of the company not being warranted by the act of May 23, 1874, authorizing cities to construct their own water works or to contract for a water supply and give the exclusive privilege for a certain period. White *v.* Meadville, 177 Pa. St. 643, 35 Atl. Rep. 695, 34 L. R. A. 567 ; Metzger *v.* Beaver Falls, 178 Pa. St. 1, 35 Atl. Rep. 1134.

The Pennsylvania act of April 29, 1874, for the incorporation of water companies, which enacts that "the right to have and enjoy the franchises and privileges of such corporation within the district of locality covered by its charter shall be an exclusive one, and no other company shall be incorporated for that purpose until the said company shall have, from its earnings realized, "paid a dividend equal to 8 per cent. per annum for a period of five years, does not confer upon a water company an exclusive privilege as in a question with an individual who has introduced water into a borough before the date of the charter of the water company. Appeal of Freeport Waterworks Co. (Pa.), 29 Am. & Eng. Corp. Cas. 320.

A corporation organized to supply a village with water cannot, by accepting the provisions of the Pennsylvania Constitution and the act of April 29, 1874, and its supplements and amendments, after the repeal of the exclusive privileges given to water companies by § 34, ch. 3, of that act, by the act of June 2, 1887, obtain an exclusive right or privilege to supply water to the village. Centre Hall Water Co. *v.* Centre Hall Borough, 186 Pa. St. 74, 40 Atl. Rep. 153.

The right to the exclusive privilege of supplying a borough with water so as to prevent the borough from having its own water supply is not acquired by the mere fact that the company has had such privilege for a number of years. Centre Hall Water Co. *v.* Centre Hall Borough, 186 Pa. St. 74, 40 Atl. Rep. 153.

Where the charter of a water company does not in terms expressly declare that the power and privilege to supply water to a city are vested exclusively in the company, and does not deny to the state the right to make other similar grants for that purpose, no exclusive franchise will be implied, although at the time when the grantee of the franchise assumed the power, pursuant to the charter, to furnish water there was no other means of supply in contemplation, and the company's charter required it, when requested, to furnish water to the city for extinguishing fires and other purposes, a contract made pursuant to such request not having the effect of binding the city to obtain its water supply from the company alone during its existence. Syracuse Water Co. *v.* Syracuse (N. Y.), 29 Am. & Eng. Corp. Cas. 307.

Notes

Where a contract between a city and a water company duly authorized by the legislature to use the streets and to contract for supplying the municipality merely provides for supplying the city with a certain number of hydrants and fixes the maximum rate to be charged, the city is not prevented thereby from procuring a plant and furnishing water for both itself and the citizens. Bienville Water Supply Co. *v.* Mobile (C. C.), 95 Fed. Rep. 539.

Exclusive rights are not conferred on a water company by the condition imposed by the town council of the duty to supply water, especially where the council has no power to confer such exclusive rights. Westerly Waterworks Co. *v.* Westerly (C. C.), 80 Fed. Rep. 61.

A legislative grant of an exclusive right to supply a municipality and its inhabitants with water by means of pipes and mains laid through the public streets, upon condition of the performance of the service by grantee, is no infringement of that clause in the Bill of Rights of Kentucky, which declares that all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services. Louisville Gas Co. *v.* The Citizens' Gas L. Co., 115 U. S. 683.

The judges of the Court of Appeals of Kentucky were equally divided upon this point, the above case having been considered by them two years previous to the decision of the Supreme Court. Citizens' G. L. Co. *v.* Louisville G. Co., 81 Ky. 263, 1 Am. & Eng. Corp. Cas. 156.

It was held in New Jersey that even if a city's grant to a water company of the exclusive privilege of supplying it with water was *ultra vires* and void, as creating a monopoly, the city had exhausted its power as to providing its supply; that the company's franchise was exclusive, and that a court of equity would enjoin the laying of pipes, etc., by all persons proposing to compete with such company, the ground being taken, that, if the company had carried out its agreement to provide an amply supply of pure and wholesome water, it should be protected against the destruction or diminution of the value of its property by competition. While the decisions disagree where the company is not vested with a monopoly, it seems well settled that equity will protect a corporation entitled to the enjoyment of an exclusive franchise against unlawful competition. Atlantic City Waterworks *v.* Atlantic City, 12 Stew. (Eq.) 375, 15 Am. & Eng. Corp. Cas. 327; Del. & Rar. Com. Co. *v.* Rar. & Del. Bay. R. R. Co., 2 McCart. 13; Ogden *v.* Gibbon, 4 Johns. Ch. 150; Newburgh Turnpike Co. *v.* Miller, 5 *Id.* 101.

See also as to grants of exclusive privileges by municipalities,

Notes

Grand Rapids Electric Light, etc., Co., *v.* Grand Rapids, etc., Co., 20 Am. & Eng. Corp. Cas. 270.

"An act for the construction, maintenance, and operation of water works for the purpose of supplying cities, towns and villages of New Jersey with water," authorizes the formation of more than one company in a city, town, or village for the purpose designated. State *v.* Consumers' Water Co. (N. J.), 24 Am. & Eng. Corp. Cas. 260.

Two or more corporations may be formed under the N. J. Water Companies Act of 1876, in any one of the localities to which it applies; and each acquires, as it is formed, precisely the same right to make use of the public highways in conducting its business. Atlantic City Waterworks Co. *v.* Consumers' Water Co. (N. J.), 24 Am. & Eng. Corp. Cas. 629.

A corporation was organized to supply water to a town, and subsequently the town was annexed to a city by an act (Laws 1886, ch. 335) which prohibited the city from furnishing water to the territory occupied by the town until the expiration of the company's charter, or until the purchase and acquisition by the city of its property. *Held*, that the act did not affirm or establish any exclusive right on the part of the company to furnish water, but simply affected the power of the city, and that its only purpose was to protect the franchise of the company in the event the city did not purchase or acquire the corporate property as authorized by the act. *In re* City of Brooklyn, 143 N. Y. 596, 48 Am. & Eng. Corp. Cas. 37.

In the absence of satisfactory evidence going to show that a particular company has the monopoly of supplying a given community with water, court a will not grant a preliminary injunction restraining similar corporations from bidding for business in the same place. That such company may be injured by the competition of rivals, is immaterial. Appeal of City of Chester (Pa.), 8 Atl. Rep. 400.

The Supreme Court of the United States has held that under a legislative grant to an incorporated company, giving it the exclusive right to supply water to a municipality and its inhabitants, and upon the conditions of the performance of the service by the grantee, the city has not the right to grant the privilege of laying pipes and conduits across and through a river bank and the public streets to parties desiring to draw water for their own use alone. New Orleans W. W. Co. *v.* Rivers, 115 U. S. 674, 10 Am. & Eng. Corp. Cas. 662.

But it was subsequently held by the supreme court of Louisiana, that an injunction will not issue to prevent persons from procuring water in this way when such company has no adequate means for the delivery of water in sufficient quanties for the wants of consumers. New Orleans W. W. Co. *v.* Ernst *et al.*, 32 Fed. Rep. 5.

Edgerton *v.* Goldsboro Water Co

It has been held that a legislative grant to a water company of the exclusive right of supplying a community for thirty years is no monopoly under that section of the constitution of the state of Tennessee which prohibits perpetuities and monopolies; this on the ground that the erection of water works is one of the ordinary powers of municipal corporations, and that the granting of this power by the legislature to an incorporated company for a term of years would not render it a monopoly any more than if the works were erected by the municipality itself. City of Memphis *v.* Memphis Water Co., 5 Heisk. 495.

EDGERTON

v.

GOLDSBORO WATER CO.

(*Supreme Court of North Carolina, March 6, 1900.*)

Municipal Corporations—Power to Levy Tax.—A legislative grant of power is necessary to enable a city to levy and collect a tax.

Same—Water Supply.*—The furnishing of a water supply is not one of the necessary expenses of a municipal government.

Same—Same—Submission to Taxpayers.*—The charter of a municipal corporation providing that the board of aldermen "shall provide water" does not authorize them to levy and collect a tax to meet a contract for a water supply for the city without complying with the provisions of art. 7, § 7, const. of North Carolina, prohibiting the officers of any municipal corporation from levying and collecting any tax except for the necessary expenses of the corporation, unless by a vote of the majority of the qualified voters therein.

APPEAL by defendant from Wayne county superior court. *Modified.*

W. C. Munroe, for appellant.
Allen & Dortch and *Aycock & Daniels*, for appellee.

FURCHES, J. The plaintiff is a citizen and taxpayer of the city of Goldsboro, and brings this action to enjoin and

*See North Springs Water Co. *v.* City of Tacoma (Wash.) *ante*, and *notes*.

Case Stated.

restrain the city authorities from paying the defendant the Goldsboro Water Company $1,395, this being the semiannual rental for water supplies furnished the city of Goldsboro by said water company, which the plaintiff alleges that the defendant city of Goldsboro is about to do. The plaintiff alleges that this money was collected by the levy of taxes upon the citizens and property of said city, and can only be used and paid out for the lawful necessary expenses of the city government; that the furnishing of water to the city by the water company is not a necessary expense of the city government, and that the same was wrongfully and unlawfully levied and collected, and that it would be unlawful to pay the same to the defendant water company; that defendant city was never authorized by any special act of the legislature to levy any such tax, or to collect the same, or to submit a proposition to the voters of said city, and that in fact no such proposition has ever been submitted or voted upon by said city. It is admitted by defendants that said money was levied and collected as a tax on defendant city; that there has been no act of the legislature authorizing a submission of the question to the vote of the people, and that no such vote has been taken. And it is not denied but what the city was about to make the payment, as alleged by the plaintiff. But the defendants allege and say that the charter of the city of Goldsboro provides (Priv. Laws 1899, c. 171, § 27) "that among the powers hereby conferred on the board of alderman, they shall provide water, provide for repairing the streets," etc.; that this made it their duty to provide a supply of water for the city, and made water a legislative necessity, and did away with the requirement of article 7, § 7, of the constitution; that, so understanding the law, the city contracted with the assignor of the defendant water company to furnish the city of Goldsboro a supply of water (as specified in said contract) for the public use of the city and for the private use of its citizens, the citizens paying a stipulated price for the use of the water; that under the terms of the contract the city was

to pay the water company $2,790 per year in semiannual installments, and the payment of the money sought to be enjoined is one of the semiannual payments; that upon these facts the court below granted the injunction, and the defendants appealed.

This presents a constitutional question,—the power of the defendant city to levy, collect, aud pay out money. But it seems to us that it has been substantially decided by the recent adjudications of this court. A city has no right to levy and collect a tax unless it has legislative power to do so. It has no powers except those given by legislative authority, in express terms or by necessary implication, in aid of express powers. 1 Dill. Mun. Corp. § 89, quoted with approval in State *v.* Webber, 107 N. C. 962, 12 S. E. 598. But it is contended by defendant that, as the charter of Goldsboro provides that it "shall have power to provide water for the city," this is an express legislative power, and, the power being conferred, the courts will not undertake to direct or supervise the manner in which this shall be done. It must be conceded that, if the first proposition be true, it had the power to levy and collect the taxes, the second proposition is necessarily true, and the courts cannot and will not undertake to supervise their action as to the manner of its execution, unless a manifest abuse of power be shown. It has been held by this court that, where a town levied a tax in aid of the common schools of the town, under and within the provisions of an act of the legislature not passed according to the requirements of the constitution, such levy is void, for the reason that the act had not been passed as provided by article 2, § 14, of the constitution; common schools not being one of the necessary expenses incident to the corporate government. Rodman *v.* Town of Washington, 122 N. C. 39, 30 S. E. 118. The court has also held that an electric light plant was not a necessary expense incident to the government of a town, and that an attempt to establish one by the city, to be paid for and sup-

Municipal Corporations—Power to Levy Tax.

ported by taxation without having the required constitutional legislation, was *ultra vires*, and void. Mayo *v.* Board, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163. It has been held by this court that a waterworks plant was not a necessary incident to the administration of the city government, and that an effort to levy and collect a tax out of the city for that purpose, without having the required legislative power to do, so was unconstitutional, and void. City of Charlotte *v.* Shepard, 120 N. C. 411, 27 S. E. 109, and this opinion was cited with approval in Mayo *v.* Board, *supra*. From these authorities it must be held that it is not one of the necessary expenses of a city or town government to furnish the city or town with a supply of water. And we do not understand the defendants to seriously contend that this is not generally so, although they cite Tucker *v.* City of Raleigh, 75 N. C. 271; Smith *v.* City of Newbern, 70 N. C. 14, and Smith *v.* City of Goldsboro, 121 N. C. 352, 28 S. E. 479. But it does not seem to us that these cases sustain the contention that the water contracted for in this case was a necessity to the town government. In Tucker *v.* City of Raleigh it appeared that a part of the little account sued on was for cleaning and repairing public wells. This is covered by the case of Spaulding *v.* Inhabitants of Peabody, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397, cited with approval in Mayo *v.* Board, *supra*, as being allowed by reason of ancient custom. The cases of Tucker *v.* City of Raleigh and Smith *v.* City of Goldsboro are cited, discussed, and disposed of in Mayo *v.* Board. In Smith *v.* City of Newbern, *supra*, it is incidentally stated, in the argument of the case, that the city would have the right to bore an artesian well. If it had held that a city might have such a well, we do not think it would sustain the defendants' contention in this case. But that was not the point in that case, and was in no respect necessary to its decision, and it could, at most, be regarded as no more than an *obiter*. But it was contended with earnestness by the defendants that, because the charter said it should be the duty of the city authorities to

Same—Water Supply.

supply the city with water, this made it a necessary expense. We cannot give our assent to this proposition. To put the most favorable construction upon this language, it can only mean that they should do so in a lawful way. To put the meaning upon this provision of the charter that defendants contend for would be to destroy the provisions of article 7, § 7, of the constitution, which provides that "no county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." If the legislature had the power to make a thing necessary by saying that it should be done, or even saying that it was necessary, this wise provision of the constitution would be utterly destroyed. It seems to us that this proposition is so self-evident that it needs no authority to support it. But we think it is sustained by State *v.* Webber, *supra*. In that case it was attempted to make the owners of certain houses guilty of keeping houses of ill fame, whether they occupied them or not. The court held this could not be done; that saying they were the keepers of such houses did not make them so. See State *v.* Clay, 118 N. C. 1234, 24 S. E. 492; State *v.* Thomas, 118 N. C. 1221, 24 S. E. 535. The money sought to be enjoined has been collected, but it is still in the possession and control of the city of Goldsboro. But, if it has been illegally levied and collected, the wrongful paying it out may be enjoined. Board *v.* Snuggs, 121 N. C. 394, 28 S. E. 539. If the authority of the city to levy and collect this tax was doubtful (which, to us, does not seem to be so), that doubt would have to be resolved against the defendants. 1 Dill. Mun. Corp. § 91, and note 2. We are therefore of the opinion that the levy and collection of this money was *ultra vires*, and unconstitutional; that to pay it out to the waterworks company, as it is proposed to do, would be unconstitutional and unlawful, and for this reason the injunction should be continued as to the payment of this money to

Same—Same—Submission to Taxpayers.

the defendant water company for water furnished the city of Goldsboro.

Holding as we do, as to the question of power, we do not find it necessary to consider the question as to the quality of the water. The injunction, modified in accordance with the opinion, is continued. Modified and affirmed.

CLARK, J. (dissenting). Without calling in question our decisions that waterworks are not a muncipal necessity, I think that water for public sanitation and protection of public buildings is such necessity, and that, when the legislature of the state has required the town to procure water, to the above extent at least, it is a necessary purpose. "The courts have nothing to do with the wisdom, policy, or necessity of statutes which require an exercise of the police power." Chicago, B. & Q. R. Co. *v.* State (Neb.), 53 Am. St. Rep. 557, 572, and notes (s. c. 66 N. W. 624); Morris *v.* City of Columbus (Ga.), 66 Am. St. Rep. 243, and notes (s. c. 30 S. E. 850).

JONES

v.

CITY OF WILLIAMSBURG.

(*Supreme Court of Appeals of Virginia, Jan. 18, 1900.*)

Personal Injuries—Collision with Bicycle—Liability of City.*— A municipal corporation is not liable to a person injured while walking on the sidewalk by being collided with by a bicycle being ridden on the sidewalk.

ERROR by plaintiff to Williamsburg and county of James City circuit court. *Affirmed.*

J. N. Stubbs and *B. H. Ewan*, for plaintiff in error.

B. B. Munford and *H. W. Anderson*, for defendant in error.

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*See note at end of case.

Jones *v.* City of Williamsburg

RIELY, J. The plaintiff was struck and injured by a bicycle that was being ridden upon a sidewalk of one of the streets of the defendant corporation, and brought this action to recover damages for the injury. There was a demurrer to the declaration, which was sustained by the circuit court, and the case is before us upon a writ of error.

The complaint is not that the injury was caused by a bicycle that was stationary upon the sidewalk, and had been negligently allowed by the city to remain there, but that it was due to the propulsion of the bicycle against the plaintiff, while in motion, under the power and will of its rider. It is obvious, therefore, that, if the city be liable in damages for the injury, its liability results, not from a defective condition of the sidewalk, but from the improper and dangerous use that was being made of it by the bicyclist.

A municiple corporation has a dual character, the one public and the other private, and exercises correspondingly twofold functions, the one governmental and legislative, and the other private and ministerial. In its public character, it acts as an agency of the state, to enable it the better to govern that portion of its people residing within the municipality, and to his end there is granted to or imposed upon it by the charter of its creation powers and duties to be exercised and performed exclusively for public governmental purposes. These powers are legislative and discretionary, and the municipality is exempt from liability for an injury resulting from the failure to exercise them, or from their improper or negligent exercise. In its corporate and private character there are granted unto it privileges and powers to be exercised for its own private advantage, and are for public purposes in no other sense than that the public derives a common benefit from the proper discharge of the duties imposed or assumed in consideration of the privileges and powers conferred. This latter class of powers and duties are not discretionary, but ministerial and absolute; and, for an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for

damages, in the same manner as an individual or private corporation. The line of distinction between the two classes of powers and duties is clearly drawn by the courts and text writers, and the exemption of the municipality from liability in the one case, and its liability in the other for an injury resulting from negligence, firmly established. 2 Dill. Mun. Corp. (4th Ed.) §§ 949, 966; City of Richmond *v.* Long's Adm'r, 17 Gratt. 375; Sawyer *v.* Corse, *Id.* 230; Terry *v.* City of Richmond, 94 Va. 538, 27 S. E. 429; Maia's Adm'r *v.* Directors (Va.), 34 S. E. 617.

Cases doubtless arise in which the courts experience difficulty in determining whether the injury complained of is the result of the failure to exercise, or the negligent exercise, of a governmental and public power, or is due to negligence in the exercise or performance of a ministerial and private power or duty; but, as respects the particular case before us, there is no such difficulty.

Streets, like other highways, are for the use of the public, and their use is none the less for the public at large because they are within the municipality, and subject to its supervision and control. Streets, as popularly distinguished from sidewalks, though including the latter, are principally designed for the use of vehicles and animals, and sidewalks for the use of pedestrians. Bicycles come under the definition and description of vehicles, and sidewalks are not the proper place for them. But the right to regulate the use of the highways of the state or of the streets of a city is clearly a governmental power, and its exercise, whether by the state or by a municipal corporation as an agency of the state, is legislative and discretionary; and, being legislative and discretionary, a municipal corporation, as an arm of the state, is no more liable for the failure to exercise the power or for its improper exercise than the state itself would be.

The defendant was empowered by its charter to lay off streets and walks, and improve the same, but it was wholly within its discretion when and where it would do so. For the omission to exercise the power, it being legislative and

discretionary, it would not be liable for an injury occurring in consequence of the omission, although, when the power was exercised, the duty to keep the streets and walks in a reasonably safe condition for travel would become a ministerial and positive duty, for the neglect whereof it would be liable for an injury resulting therefrom. 2 Dill. Mun. Corp. (4th Ed.) §§ 949, 1048. The condition of the street or walk, however, is one thing, and the manner of its use by the public is quite a different thing. For its safe condition the city is responsible, but for its unlawful or improper use it is not.

The peace, good order, and welfare of a community is a primary object of a government, and laws are enacted by the sovereign power, and ordinances adopted by municipal corporations, for the preservation thereof; but clearly neither the state, nor the municipality, would be liable for an injury received in an affray upon one of its streets, or in a collision from fast riding or driving, in consequence of the absence of a law or ordinance prohibiting the same, or the failure of the authorities of the state or city to enforce it, if enacted or adopted, although but for the want of a proper law or ordinance, or the failure to enforce the same, the injury would not have happened. The government does not guaranty its citizens against all the casualties incident to humanity, and cannot be called upon to compensate, by way of damages, its inability to protect against such accidents and misfortunes. The failure to pass a needful law or ordinance is plainly the omission by the state or city as an agency thereof of a public, governmental duty, for which no action lies. Hence, upon this principle, it has been held by the courts, and laid down by approved text writers, that a municipal corporation, in the absence of an express statutory declaration to the contrary, is not liable for failing to pass an ordinance prohibiting the firing of cannon or firearms in its streets, or the explosion of fireworks, or the engaging in dangerous sports, or the running at large of cattle and swine, or for suspending or neglecting to enforce an ordinance against such dangerous

practices and improper use of its streets, in consequence whereof private property was destroyed or persons injured. Elliott, Roads & S. 465; 2 Dill. Mun. Corp. (4th Ed.)§ 949, note; 1 Shear. & R. Neg. (5th Ed.)§ 262; Cooley, Const. Lim. (6th Ed.) note to page 254; Cooley, Torts (2d Ed.) 739; Boyland *v.* Mayor, etc., 1 Sandf. 27; Levy *v.* Same, *Id.* 465; Ball *v.* Town of Woodbine, 61 Iowa, 83, 15 N. W. 846; Davis *v.* City Council, 51 Ala. 139; Hill *v.* Board, 72 N. C. 55; Kelley *v.* City of Milwaukee, 18 Wis. 83; Rivers *v.* City Council, 65 Ga. 376.

The doctrine of the exemption of a municipal corporation from liability for injuries resulting from the unlawful or improper use of its streets, and sidewalks and not from any defect in their state or condition, has been applied where persons have been injured by "coasting,"—a practice so similar to the use of sidewalks by a bicyclist that a different conclusion cannot be reached in the case of an injury caused by a collision with a bicycle. City of Lafayette *v.* Timberlake, 88 Ind. 330; Faulkner *v.* City of Aurora, 85 Ind. 130; Pierce *v.* City of New Bedford, 129 Mass. 534; Steele *v.* City of Boston, 128 Mass. 583; Shepherd *v.* Inhabitants of Chelsea, 4 Allen, 113; Schultz *v.* City of Milwaukee, 49 Wis. 254, 5 N. W. 342; Burford *v.* City of Grand Rapids, 53 Mich. 98, 18 N. W. 571; Hutchinson *v.* Town of Concord, 41 Vt. 271; Weller *v.* City of Burlington, 60 Vt. 28, 12 Atl. 215; Ray *v.* City of Manchester, 46 N. H. 59; Mayor, etc., *v.* Vandegrift (Del. Err. &. App.), 29 Alt. 1047, 25 L. R. A. 538.

The exemption of a municipality from liability for an injury resulting from the unlawful or improper use of its streets and sidewalks, with the reason therefor, is very clearly stated in City of Lafayette *v.* Timberlake, *supra*, a case of injury resulting from "coasting" upon a sidewalk, where the court said:

"The manner in which a highway of a city is used is a different thing from its quality and condition as a street. The construction and maintenance of a street in a safe con-

dition for travel is a corporate duty, and for a breach of such duty an action will lie; but making and enforcing ordinances regulating the use of streets brings into exercise governmental, and not corporate, powers, and the authorities are well agreed that, for a failure to exercise legislative, judicial, or executive powers of government, there is no liability."

An injury caused by a bicycle ridden upon a sidewalk is not distinguishable from an injury caused by "coasting," and the ground of exemption from liability applies equally in the former case as in the latter. In Howard *v.* City of Brooklyn, 30 App. Div. 217, 51 N. Y. Supp. 1058, it was held that "a municipal corporation which has merely failed to pass an ordinance forbidding bicycles to be ridden over a sidewalk of the city, not having in any way authorized it, is not liable to a person walking upon the sidewalk for injuries resulting from being run into and thrown down by a bicycle."

Our conclusion is that the declaration does not state a case of legal liability, and that the demurrer was properly sustained.

The judgment of the circuit court must be affirmed.

NOTE.

Personal Injuries—Failure to Prohibit Bicycle Riding on Sidewalk —Liability of Municipal Corporation.—No action lies against a municipal corporation for the negligent exercise or non-exercise of its discretionary powers of a public or legislative character. See Tarbutton *v.* Town of Tennille (Ga.), *ante*, 140, and *foot-note*. In this case it was held that the city was not liable to a person injured while walking on a sidewalk by being collided with by a bicycle ridden thereon, because of its failure to prohibit bicycle riding on its sidewalks. See also Lecher *v.* Newark (N. Y. Sup. Ct.), 44 N. Y. Supp. 556, where it is held that a municipal corporation may license the use of sidewalks by bicycle riders without incurring any risk of liability for personal injuries caused by collisions on the sidewalks between pedestrians and bicycles, except where it is shown that the ordinance licensing such use of the sidewalk had given rise to or created a public nuisance.

LONG

v.

CITY OF ELBERTON.

(*Supreme Court of Georgia, Oct. 28, 1899.*)

Erection of Prison by Municipality—Injury to Adjacent Property—Damages.—The erection of a prison by the municipal authorities of a city, within the limits thereof, is not an invasion of the property rights of the owner of adjacent lands, and therefore not the foundation of an action for damages against the city.

Nuisances—Maintenance of Prison—Damages.*—After the erection of such a building, it is the duty of the public authorities to use and maintain the same in a proper and orderly manner, and, if they permit it to be so negligently kept as to create a nuisance, the damage caused thereby may give a right of action to one who sustains special and particular injury, not for the erection, but for such negligent maintenance.

(Syllabus by the Court.)

ERROR by plaintiff from Elbert county superior court. *Affirmed.*

J. P. Shannon and *P. P. Proffitt*, for plaintiff in error.

I. C. Van Duzer and *J. N. Worley*, for defendant in error.

LITTLE, J. Plaintiff in error instituted an action to recover damages against the city of Elberton. He alleged: That he was the owner of a hotel building in said city, and eight brick storehouses adjoining and opposite his hotel. That he expended a large sum of money in the erection of said buildings, and which before the damage complained of were worth a large amount of money. That he and his family reside in the hotel, and that the same was made comfortable and pleasant for his family as well as his

*See notes at end of case.

guests. That during the year 1897 the city of Elberton, without the consent of petitioner and against his protest, erected, within 100 feet of his property, a building known as the "City Prison," which is a brick structure, containing offices for the city, and a number of prison cells and lock-ups, in which violators of the city laws are confined. These are frequently drunk, boisterous, profane, obscene, and offensive, and frequently crowds of objectionable persons are gathered around the city prison, to the annoyance of the neighborhood. That the building is not provided with waterworks or sewers, and that slops and filth are carried therefrom daily, in full view of the public. That the prison emits foul air, unwholesome stenches, and the inmates make discordant and savage noises, and the city convicts are kept therein. That this building is so situated that it stands broadside to the hotel building, with no obstruction between the two buildings, and all the unpleasant accompaniments of the prison are in full view of the windows and piazzas of the hotel, and of persons dwelling therein or on the grounds attached thereto. He alleges that the same is a nuisance; that he endeavored to induce the city authorities not to construct the building at that place, informing them that it would injure his business and the value of his property, but they did so, over his protest. He alleges that the erection of the prison was a violation of the public duty, and a reckless disregard for his rights, and the maintenance of the same as situated is a gross wrong; that it renders his home undesirable, and his hotel building less desirable for a hotel, his storerooms less valuable for business, and has injured the market value of all his property above described, whereby he has been damaged the sum of $5,000; that the city authorities could easily have erected said prison elsewhere, where the damage it would cause would have been insignificant; that he himself offered to the city a lot in rear of his property which was convenient in every respect, but they refused to erect the prison on that lot; that it was located in its present place as the result of bad faith, and on account of ill will to

petitioner. He alleges that the prison, and the manner in which it is used and kept, is a nuisance, and has greatly damaged his property, and that its erection was, and its maintenance is, a direct invasion of his rights, for which he is entitled to recover damages, under the constitution and laws of this state. The petition, as amended, was demurred to generally. The court sustained the demurrer, and the plaintiff in error excepted.

Erection of Prison by Municipality—Injury to Adjacent Property—Damages.

It is claimed by counsel for plaintiff in error that, since the adoption of the constitution of 1877, a municipal corporation is liable to an individual for damages to private property to the same extent, and under the same circumstances, that it is liable for property taken for public purposes, and we understand the present action is based on the provision of that constitution which declares that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid (Civ. Code, § 5729); and it is contended that the erection of the city prison in Elberton, and the use of said building for the confinement of violators of the law, in close proximity to the property of the plaintiff in error, has depreciated the value of said property, and therefore damaged it, in the sense contemplated by the constitution. It was not necessary in this case that the meaning of the word "damaged" in the constitution shall be either considered or discussed. It was passed on by this court in the case of Austin *v.* Railway Co., 34 S. E. —. The simple erection of a necessary prison building cannot, without more, so injure adjacent property as to entitle the owner to have damages for such erection. No one is so hindered in the use of his property, and so restricted as to the character of buildings he shall put upon it, as to make it necessary to consult adjacent lot owners in reference to the improvements to be made. The lot being his own property, the owner may put it to such use as he sees proper, provided the buildings and improvements made by him do not infringe the legal right of his neighbor to the similar enjoyment of his own

property. A log house on a fashionable street may be built alongside of a palace, and by its erection the value of the latter may be depreciated, but that depreciation is *damnum absque injuria*. The owner of the lot has as much right to erect the hut as the other has to build his palace,—no more, no less; but, if the hut or the palace be so used as to interfere in the lawful enjoyment of his property by the other, there the damage, with a right to compensation, exists. If noxious gases from a business carried on in either befouls the air which the other is entitled to have without it; if the flow of poisonous fluids from a manufactory carried on either sterilizes the land of the other; if offensive smells emanate from the one, and affect the health of those dwelling in the other,—then there is a cause of injury which the law will redress, because the use which brings about any of these things is an infringement on the rights of the other; but none can be allowed for the character of the building. The municipal authorities of the city of Elberton being invested with certain powers of government, had a legal right (being necessary to the exercise of those powers) to erect a building for the purpose of furnishing public offices and maintaining a prison in which might be securely kept violators of the law; and the rule is clearly established that a corporation authorized by the law to do a particular thing, so long as it keeps within the scope of the power granted, is completely protected from proceedings, either at law or in equity, in behalf of the public therefor (2 Wood, Nuis. § 753); and that if, in the discharge of a duty imposed by law, it proceeds in a careful and prudent manner, the damages resulting therefrom to individuals are *damnum absque injuria* (Northern Transp. Co. *v.* City of Chicago, 99 U. S. 635; Fair *v.* City of Philadelphia, 88 Pa. St. 309; Flori *v.* City of St Louis, 69 Mo. 341; Toolan *v.* City of Lansing, 38 Mich. 315). In the case of Bacon *v.* Walker, 77 Ga. 338, this court, CHIEF JUSTICE JACKSON delivering the opinion, said: "It is true that nobody would be pleased at the erection of a jail in the vicinity of his residence, but it must be built somewhere. It is a public

necessity. It is authorized by law. In no sense, or rather in no legal sense, is it a nuisance. Nothing that is legal in its erection can be a nuisance *per se*. Much less can that which public necessity demands be one. * * * It must be built in some part of the city, and near to somebody's house, * * * and equity will not stop the public works because of such damage." And in the case of Pause *v.* City of Atlanta, 98 Ga. 103, 26 S. E. 492, this court, through ATKINSON, J., said: "A distinction should be borne in mind between those cases where one seeks to recover because of the appropriation by the public to the public use of private property, and damages to one's property sustained in consequence of the construction of such public improvement, and that other class of cases, in which, though one's property be neither appropriated nor damaged, yet, in consequence of the construction of such improvement, one suffers damage resulting from personal inconvenience, and consequent damage in the conduct of one's business. In the former cases the right of compensation is a matter of principle; the amount of damage, a mere matter of degree. However slight or however great one's damage may be, he is nevertheless entitled to compensation. In the latter class of cases something more must appear than mere damage or inconvenience. It must be made to appear that, in the construction of such an improvement, the municipal authorities have been guilty of negligence, omission of duty, or negligent commission of an act authorized by law, in order to authorize recovery." Under the authority of the cases cited, the plaintiff was not entitled to recover for the erection of the prison. Undoubtedly, it added nothing which was desirable to the neighborhood and detracted much from it; but this, and similar inconveniences, are to be borne by the citizen in the vicinity of whose property such public buildings are located, and for his inconvenience and depreciation in values in property so occasioned the law affords no compensation. It does not, however, follow that because the erection of such a building was a public

Nuisances—Maintenance of Prison—Damages.

Notes

necessity, and the authorities had the right to select the lot upon which it was erected, it can be so maintained as to perpetuate a nuisance. While the authorities have a right to use and maintain it for the purposes intended, the duty rests upon them to maintain it in a proper manner, and, if such maintenance after its erection should prove a nuisance, it is the right of any citizen of Elberton, or other person interested, either to abate the same, or, if special and particular damage is caused to him, to obtain proper compensation for his injury. 2 Wood, Nuis. § 748. Inasmuch, however, as the petition seeks to recover damages from the city for the erection and maintenance of the building as a prison, and the law nowhere authorizes such to be given under the circumstances detailed in his petition, the court committed no error in sustaining the demurrer thereto, and the judgment is affirmed. All the justices concurring.

NOTES.

Nuisances—Liability of Municipal Corporations.—As to the liability of a municipal corporation for maintaining a nuisance, see City of New Albany *v.* Slider (Ind.), 1 Mun. Corp. Cas. 157, and *notes*, 162 *et seq.*

Liability of Municipal Corporation for Negligence in Keeping Jail.—Where a person is confined in a city prison, upon a conviction for disturbing the peace and quiet of the city, the city is not liable for damages for injuries sustained by such person by reason of the bad character of the prison, or the negligence of the officer in charge of the same. La Clef *v.* City of Concordia, Kas. Sup. Ct., April 5, 1889. The court said: "It has already been held in this state that counties are not liable for injuries of this kind (Pfefferle *v.* Board of Commissioners, 39 Kan. 432), and this seems to be the doctrine universally held elsewhere (see Wehn *v.* Comm'rs of Gage Co., 5 Neb. 494; Crowell *v.* Sonoma Co., 25 Cal. 313; Miller *v.* Iron Co., 29 Mo. 122; Town of Waltham *v.* Kemper, 55 Ill. 346; Brabham *v.* Supervisors of Hines Co., 54 Miss. 363; Winbigler *v.* Mayor, etc., of Los Angeles, 45 Cal. 36); but it is urged that a different rule prevails in respect to cities and other public corporations, and that they are not such political divisions of a state as to entitle them to immunity from damages for injuries such as complained of. It is not claimed that there is any

Notes

statute making it the duty of a city of the third class, to which class the defendant belongs, to keep and maintain comfortable and safe city prisons, and no charter has been shown requiring this duty of the defendant. Where such duties are imposed by law upon municipal corporations, they then become liable when the duty enjoined relates to some act in the doing of which the city has some special interest apart from the public generally. Sawyer *v.* Corse, 17 Grat. (Va.) 230; Merrifield *v.* City of Worcester, 110 Mass. 216; Emery *v.* City of Lowell, 104 Mass. 13. But, where such duties relate to acts, which in their nature are for the benefit of the public as well as the citizens of the city, then no responsibility follows that can be enforced by private action. Pfefferle *v.* Board of Commissioners, 39 Kan. 432; Gould *v.* City of Topeka, 32 Kan. 485, 5 Am. & Eng. Corp. Cas. 595; City of Wellington *v.* Gregson, 31 Kan. 99, 6 Am. & Eng. Corp. Cas. 215; Bigelow *v.* Inhabitants of Randolph, 14 Gray (Mass.), 541; Hill *v.* City of Boston, 122 Mass. 344; Eastman *v.* Meredith, 36 N. H. 284; Hamilton Co. *v.* Mighels, 7 Ohio St. 109; Board *v.* Strader, 18 N. J. Law, 121; Finch *v.* Board of Education, 30 Ohio St. 37; Flori *v.* St. Louis, 69 Mo. 341; Western College of Homeopathic Medicine *v.* Cleveland, 12 Ohio St. 375.

"The distinction between an act done by a city in a public capacity and as a part of the political subdivisions of a state, and for an act done for its private advantage, and relating to things in which the state at large has no interest, is clearly defined and is well recognized. See Society *v.* Philadelphia, 31 Pa. St. 185; Maxmilian *v.* Mayor, etc., of New York, 62 N. Y. 160; Bailey *v.* Mayor, etc., of New York, 3 Hill (N. Y.), 531. In Hill *v.* Boston it was said: 'The examination of the authorities confirms us in the conclusion that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, and by a general law applicable to all cities and towns in the commonwealth, and a breach of which in the case of a town would give no right of private action, is a duty owing to the public alone, and a breach thereof by a city, as by a town, is to be redressed by prosecutions in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby.' This seems to be the current of authority everywhere: that a city, while acting as a political part of the state in suppressing crime and immorality, and in the preservation of peace and good order, is not liable for its acts, although negligently committed by the city or its agents; and, with the exception above noted, the city stands in the same catalogue with counties, townships, and other *quasi* municipal corporations in this respect, and is

Notes

not liable to a personal action for injuries resulting from the enforcement of the public laws affecting the state at large."

But in Edwards *v.* Town of Pocahontas, 47 Fed. Rep. 268, it was said by the U. S. Circuit Court for the Western District of Virginia that a distinction exists as to their liability for the negligence of their officers between municipal corporations proper, such as chartered towns and cities, which voluntarily assume a part of the sovereignty of the state for purposes of local government, and counties, which are arbitrary political divisions of the state established by general laws for general governmental purposes; and the former can be held liable for the negligence of its officers in keeping a filthy and unhealthy prison, whereby injury results to a person confined therein. Code Va. 1887, § 927, provides that every town having no jail of its own may use the county jail. Sections 928-930, applicable only to counties and cities, provide that the jailer shall keep the jail always clean, that jails shall be inspected under direction of the county court, and that the jailer may be summarily punished for failure in his duty. *Held*, that a town which used a jail of its own was liable for injuries to the health of a prisoner caused by its filthy condition; since under section 927, and a special provision of its charter, it might have used a county jail, subject to inspection and control.

The court said: "The distinction, as it is usually drawn between municipal corporations proper, such as chartered towns and cities, and involuntary *quasi* corporations, such as counties, is comprehensively defined by JUDGE DILLON in his Commentaries on the Law of Municipal Corporations, (section 23), and as thus defined is now generally recognized. As stated by the supreme court of Ohio, in Hamilton Co. *v.* Mighels, 7 Ohio St. 109, quoted by JUDGE DILLON: 'A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy.' And the distinction between the liability of a municipal corporation, called into existence either at the direct solicitation or by the free consent of the persons composing it, for the promotion of their own local and private advantage and convenience, and that of counties and other political divisions of a state, established by general laws, for the negligent conduct of their offi-

Notes

cers and agents, is clearly defined. The principle upon which the distinction rests is that counties are arbitrary political divisions of a state, and the governmental powers they exercise are imposed upon them by general laws, while municipal corporations act voluntarily in their assumption of a part of the sovereignty of the state in their exercise of local self-government. 'The grant by the state to the municipality of a portion of its sovereign powers, and their acceptance for these beneficial purposes, is regarded as raising an implied promise on the part of the corporation to perform the corporate duties; and this implied contract, made with the sovereign power, inures to the benefit of every individual interested in its performance. In this respect these corporations are looked upon as occupying the same position as private corporations, which, having accepted a valuable franchise, on condition of the performance of certain public duties, are held to contract by the acceptance for the performance of these duties. In the case of public corporations, however, the liability is contingent on the law affording the means of performing the duty, which in some cases, by reason of restrictions upon the power of taxation, they might not possess. But, assuming the corporations to be clothed with sufficient power by the charter to that end, the liability of a city or village vested with control of its streets for any neglect to keep them in repair, or for any improper construction, has been determined in many cases. And a similar liability would exist in other cases, where the same reasons would be applicable.' Cooley, Const. Lim. (5d Ed.) pp. 247, 248. It may be true that no precedent can be found for an action of this character as to the particular ground for a claim of damages, but analogous cases are numerous. Actions for damages against municipal corporations are frequent for neglect to keep streets, sidewalks, sewers, etc., in a proper and safe condition. The court cannot see upon what principle a municipal corporation may be held liable in damages for not keeping its streets, sidewalks, and sewers in proper and safe condition, and yet not be so liable in damages for not keeping its prison in proper and healthy condition; except perhaps, in cases where the jailer or keeper of the prison of such municipal corporation is made by law, an officer or agent of the state, and required under penalty prescribed by law, to keep such prison in proper and healthy condition."

PLANTERS' OIL MILL

v.

MONROE WATERWORKS & LIGHT CO. *et al.*

(*Supreme Court of Louisiana, April 2, 1900.*)

Joinder of Parties.—If, as the consequence of acts of commission or omission, the solidary liability of two or more persons to another arises, such persons may be sued at one and the same time in the same action for a judgment *in solido* against them.

Municipal Corporations—Failure to Supply Water—Liability for Loss by Fire.—The power residing in a municipality to provide for a supply of water is, in its nature, legislative and governmental, and, if not exercised, and in consequence loss results to property owners by fires occurring, the municipality is not liable in damages.

Same—Same—Same.—The same is true where a municipality undertakes to provide for a supply of water by contract with a private company, which fails to adequately meet its obligations. Nor is the municipality to be held liable for the nonfeasance or misfeasance of its officials in connection with such contract or its enforcement.

Water Companies—Failure to Supply Water—Liability for Loss by Fire.*—But it is not so clear that the private company making such contract, and failing to meet its duties thereunder, may not be held answerable to the citizen for losses he sustains in consequence of such failure. The grounds for liability are herein held sufficient to justify reversal of judgment sustaining exception of no cause of action and remanding for trial on the merits.

(Syllabus by the Court.)

APPEAL by plaintiff from parish of Ouachita judicial district court. *Modified.*

E. Tyler Lamkin and *Andrew Augustus Gunby*, for appellant.

Hudson, Potts & Bernstein, for appellee Monroe Waterworks & Light Co.

Stubbs & Russell, for appellees the Mayor, etc., of Monroe.

*See notes at end of case.

Planters' Oil Mill *v.* Monroe Waterworks & Light Co

BLANCHARD, J. Plaintiff's mill property, situated in the city of Monroe, La., was destroyed by fire in February, 1899. It was partly insured in various fire insurance companies, and these companies paid plaintiff, on account of the loss, $41,114.32 in the aggregate. Plaintiff claims its total loss to have been $46,483.97, or $5,369.65 greater than the amount collected from the insurance companies. When the companies paid, they took from plaintiff a transfer and subrogation of his rights and claims, on account of the fire, against the Monroe Waterworks & Light Company and the city of Monroe. Plaintiff, for its own benefit, to the extent of $5,369.65 (representing the value of its property destroyed by the fire in excess of amount collected from the companies), and for the use and benefit of the several insurance companies to the extent of the $41,114.32 paid by them, brings this action against the defendant waterworks company and the city of Monroe, asking judgment *in solido* against them for the full amount of the loss, aggregating the aforesaid sum of $46,483.97. The suit is predicated upon a contract made by the city of Monroe with the waterworks company, by which the latter obligated itself to furnish a sufficient supply of water for the various purposes of the municipality and its citizens, including the extinguishment of fires, in consideration of the grant to the company by the city for 30 years of the franchise and right of constructing, maintaining, and operating its system of waterworks and electric lights in the city, including the right of way over the streets and public grounds of the municipality, and in further consideration of the payment by the city to the company of a stipulated sum per annum for the use and rental of a certain number of fire hydrants and arc lights, and of the right and privilege of collecting from the inhabitants of the city certain charges and rates for the use of water and electric lights. To enable the city to meet its engagement under this proposed contract,—that is to say, to provide the funds for the hydrant rental and electric lights specified in the agreement,—it was stipulated that the city

Case Stated.

should levy and collect annually a special tax of 3½ mills, to be known as the "fire hydrant and electric light tax." Before this tax could be legally levied and collected, the proposition had to be submitted to the property taxpayers of the city at a special election ordered for the purpose. The election was ordered, the proposition submitted, and adopted by the requisite vote. The proposition, as submitted, was whether the property taxpayers would direct the mayor and city council to levy and collect annually for 10 years a 5-mill tax upon all the property in the city for the purposes of public improvement, and to enable the municipality to contract for water supply, sewerage, drainage, and electric light; 3½ mills of which to be set aside and used for securing water and electric lights for the city, and 1½ mills for drainage and other public improvements. The 3½-mill tax for the water supply and electric light system having been voted by the taxpayers, the same was levied by the town council, has been collected each year since then, and is still being collected, and the proceeds thereof applied to the purposes intended. The waterworks and the electric light plant were constructed, completed in the early part of 1893, and have been operated by the company since then. The ground upon which plaintiff seeks to recover from the defendant waterworks and electric light company is that it is a citizen and taxpayer of Monroe; that it has each year paid its *pro rata* of the special tax levied for the waterworks and electric light system, and to the company the usual rates and charges for its own use of the water and light privileges; that the company obligated itself, by its contract with the city of Monroe, to supply the water necessary for the extinguishment of fires; that this obligation inures to the benefit of the citizens of the municipality as well as to the municipality itself, and for the breach thereof the company is liable to the citizen in the event of loss to him as the result of the breach, as well as to the city; that there was a breach of the obligation, and utter failure to supply the water needed, and, in consequence, the fire department of Monroe was unable to extinguish the fire

which started in plaintiff's property; and that, had there been the supply of water contracted for, its property would not have been destroyed, nor the loss it suffered incurred. A further ground upon which recovery against the waterworks company is asserted is that there had been a verbal contract entered into between plaintiff and the company by which the latter, in consideration of $100 per annum, paid to it by plaintiff, agreed to supply and have ready at all times for use in pipes and hydrants erected on the premises by plaintiff, as a precaution against fire, water in sufficient quantity and with a specified force of pressure sufficient to serve the purpose of the extinguishment of fires such as the one that destroyed plaintiff's property, and that there had been a breach, likewise, of the obligations of this contract, entitling plaintiff to recover as damages the amount of the lost sustained, which loss, it is alleged, would not have occurred had the water contracted for been supplied. The ground upon which recovery against the city of Monroe is demanded is that said city having stipulated for a bond from the waterworks company, to insure the faithful performance of the company's obligation under the contract, and the bond having been given, and having stipulated further in its contract with the company that in case of the failure of the company to keep the system of waterworks in good and efficient working order, supplying water as per its contract, the city might itself assume charge and control of the works, and operate the same, failed to require the company to fulfill its contract, failed to coerce it in respect to its duty by taking proceedings on the bond, and failed to assume charge of the works, and operate the same, under the stipulation to that effect for the benefit of the city and the inhabitants thereof; and that because of this delinquency on the part of the officials of the municipality the latter is liable to plaintiff for the loss it has incurred, and which, it is averred, would have been prevented had the waterworks company been forced by the

city to meet the obligations of its contract, or had the city itself taken charge and operated the works. The petition charges the reckless disregard and flagrant and wanton violation of its contract by the waterworks company, and that the city officials well knew of the same, and yet took no steps to conserve the rights and interests of the city and of the taxpayers and people in respect thereof. It is represented that the insurance companies, plaintiffs herein, had local agents in Monroe, and that the several contracts of insurance with the Planter's Oil Mill, and the premiums or tariff rates charged therefor, were predicated upon the contract which the waterworks company had with the city and with the oil mill for a sufficient supply of water for fire purposes, and that the companies and their representatives believed and had the right to believe the waterworks company would meet, and the city of Monroe would compel it to meet, its engagements under the contract. It will be seen that both the company and the city are charged with wrongfully and negligently occasioning the loss and destruction of plaintiff's property; and the city officials are charged with nonfeasance and misfeasance in connection with the waterworks contract, thus contributing to the loss and damage suffered by plaintiff. Under these circumstances, the liability of both the company and the city *in solido* to the claimants is asserted. Plaintiff does not annex to its petition the contract made by the waterworks company with the city, though it does annex the plans and specifications for the construction of the waterworks. The ordinance of the city relating to the contract and the contract itself are, however, found in the record. How the same got there does not appear, for the case went off on exception in the trial court, and as to this exception there was no evidence offered, and no note of evidence appears in the record. A dilatory exception of misjoinder of parties was filed, and overruled. It is insisted on here, and requires notice at our hands. The suit on part of the plaintiffs is to recover the total alleged loss by fire. Part of this

loss having been paid by the insurance companies, it was proper practice for them to join plaintiff in the suit against the alleged common debtors, or for plaintiff to sue, as was done, for the use and benefit of the companies to the extent of the loss paid by them. And it is not improper joinder of parties defendant when the city of Monroe is sued, along with the waterworks company, for the amount of the loss sustained by plaintiff. A state of facts is alleged from which, according to the theory of the petition, the obligation *in solido* of the two defendants results. If, as the consequence of acts of commission or omission, the solidary liability of two or more persons to another arises, such persons may be sued at one and the same time in the same action for a judgment *in solido* against them. An exception of no cause of action was filed, argued, and sustained by the trial court by dismissing altogether the suit against the city of Monroe, and by dismissing that branch of it against the waterworks company founded on the contract made by it with the city of Monroe. As to the other branch of the case against the waterworks company, growing out of the alleged verbal contract made by it with the plaintiff for the furnishing of water, the exception was overruled, and the company held to answer. Plaintiff appeals.

Joinder of Parties.

The ruling of the court *a qua*, holding that no cause of action against the city of Monroe is set forth, was correct. The power residing in the city to provide for a supply of water is, in its nature, legislative and governmental. Its exercise is not merely a ministerial duty. It follows that, if the power be not exercised, if no provision be made for a water supply to extinguish fires, the city is not responsible for the loss which the owners of property may sustain by fires occurring. It follows, further, that where the city has undertaken to provide a water supply, as in this case, by a contract with a private company, and there is a failure on part of the company to meet in full its obligations in this respect, and,

Municipal Corporations—Failure to Supply Water—Liability for Loss by Fire.

because of this, loss by fire results to citizens, the city is not liable. And this is so even though an annual tax be levied for the purpose. Yule *v.* City of New Orleans, 25 La. Ann. 394; Springfield Fire & Marine Ins. Co. *v.* Village of Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660; Akin *v.* Akin, 78 Ga. 24, 1 S. E. 267; Heller *v.* Mayor, etc., 53 Mo. 159; Wheeler *v.* City of Cincinnati, 2 Am. Rep. 368; Vanhorn *v.* City of Des Moines, 63 Iowa, 447, 19 N. W. 293; Brinkmeyer *v.* City of Evansville, 29 Ind. 187; Grant *v.* City of Erie, 8 Am. Rep. 272; Mendel *v.* City of Wheeling, 28 W. Va. 233; Foster *v.* Water Co., 3 Lea 42; Tainter *v.* City of Worcester, 123 Mass. 311; Witheril *v.* Mosher, 19 Hun 412. Nor is the city to be held liable for the nonfeasance or misfeasance of its officials in connection with the contract entered into by the city with the waterworks company for their failure to coerce the company to a compliance with the duties and obligations it assumed under the contract. The principle upon which this rests is succinctly stated in City of New Orleans *v.* Kerr, 50 La. Ann. 413, 23 South. 384. But it is not so clear that the waterworks company, having contracted with the city to supply water adequate to the fire necessities of the town, and, failing to do so, is not liable to citizens for losses directly traceable to its failure. Many authorities in other jurisdictions are cited by counsel for defendant to show nonliability, but it is not certain they are applicable here, considering the provisions of our Codes and statutory law. This contract, as made by the city of Monroe, was intended by both parties to inure to the benefit of the inhabitants of the town. The stipulations therein made as to a water supply for use in case of fires was in their favor. Article 1890 of the Civil Code declares that: "A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated

Same—Same—Same.

Water Companies—Failure to Supply Water—Liability for Loss by Fire.

in his favor, the contract cannot be revoked." See, also, Civ. Code art. 1902. The property taxpayers of Monroe, by voting the special tax in aid of the waterworks contracted for by the city, and subsequently paying it, signified their assent to accept the provisions of the contract which were designed to inure to their benefit. It was a sufficient evidence of their consent to avail themselves of the advantages it stipulated. If the advantages this contract stipulates were in favor of the citizens and taxpayers, then they are to be viewed as obligees thereof. Now, *Id.* art. 1926, declares: "On the breach of any obligation to do, or not to do, the obligee is entitled to damages." And *Id.* art. 1930, recites that: "The obligations of contracts, extending to whatsoever is incident to such contracts, the party who violates them is liable, as one of the incidents of his obligation, to the payment of the damages which the other party has sustained by his default." A contract may be violated passively by not doing what was contracted to be done, or not doing it at the time or in the manner stipulated or implied from the nature of the contract. *Id.* art. 1931. If the plaintiff herein is not an obligee of the contract to that extent that he may maintain a direct action on it, but is rather to be viewed as a third person, not a party to it, nevertheless, if it be true that certain stipulations in the contract have been made for its benefit as one of the citizens and taxpayers of the town, it (plaintiff company) may yet maintain an equitable action against the one who has contracted the obligation. Article 35 of the Code of Practice is authority for this, for it says: "An equitable action is that which does not immediately arise from the contract, but from equity in favor of a third person, not a party to it, and for whose benefit certain stipulations have been made." See, also, Wright *v.* Oakey, 16 La. Ann. 126; Freligh *v.* Miller, *Id.* 418; Duchamp *v.* Nicholson, 2 Mart. (N. S.) 672; Marigny *v.* Remy, 3 Mart. (N. S.) 607; Dick *v.* Reynolds' Heirs, 4 Mart. (N. S.) 527; Flower *v.* Lane, 6 Mart. (N. S.) 152; McDonough *v.* Zacharie, 3 La. 316; Gravier *v.* Gravier's Heirs, 3 Mart. (N. S.) 211; Dicey, Parties, p.

391 (marg. p. 370). If there be in this contract no express stipulation in favor of the citizens and taxpayers that a sufficient supply of water to extinguish fires would be furnished, does not such stipulation result by necessary implication? Gillis *v.* Nelson, 16 La. Ann. 275. It would seem that the waterworks company, by reason of having accepted the obligations imposed by the city ordinances and by the contract it had entered into, had a public duty to perform which embraced in its benefits every property owner of Monroe. And it would further seem that the contract it entered into was not made more for the benefit of the municipality itself than for the benefit of the inhabitants of the town. Ostr. Ins. § 343, p. 726. So, too, it has been held that a defendant who owes a duty to a community owes it, as a general rule, to every member of the community, and that, if any member suffers a special injury from a breach of that duty, an action will lie. Sisk *v.* Crump, 112 Ind. 504, 14 N. E. 381; Mining Co. *v.* Patton, 129 Ind. 472, 28 N. E. 1113. See, also, Rich *v.* Railroad Co., 87 N. Y. 395. Municipal governments, while legal entities, are no more than convenient regulations instituted by the people, that they may act in their aggregate character to secure their larger protection and happiness. Municipalities are the people acting in their corporate capacity. It was the people's money that was paid the water company. It was for the benefit of the people that the promise was made on part of the company to supply water for extinguishing fires. Ostr. Ins. § 383. If it were to the public that the promise of the contract was made, then it was to "the public as composed of individual persons." The municipality was but the agent of the public as thus composed. Its acts in the matter of the contract under consideration were chiefly fiduciary. The beneficiaries are the corporators. It will not do to say the water company owes them no duty. *Id.* §§ 345, 347, 348. See Paducah Lumber Co. *v.* Paducah Water-Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77; Gorrell *v.* Water-Supply Co. (N. C.), 32 S. E. 720. While not deciding or intending to

Notes

decide outright that plaintiff is entitled to recover against the water company on account of the contract made by the latter with the city of Monroe, we are yet of the opinion that, taking the allegations of the petition as true for the purpose of the trial of the exception, a sufficient legal cause of action against the company is disclosed to send the case to trial on its merits. For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from, in so far as it dismisses the plaintiff's suit against the Monroe Waterworks & Light Company, based on the contract between said company and the city of Monroe, be avoided and reversed, and it is now ordered and decreed that the exception of no cause of action to that extent be overruled, and that said suit, as to that branch of the case, be reinstated on the docket of the trial court, and trial thereof had upon its merits. It is further ordered, etc., that in all other respects the judgment appealed from be affirmed, costs of appeal to be borne by the waterworks company.

NOTES.

Liability of Water Company for Destruction of Property through Failure to Furnish Adequate Supply.—The courts almost unanimously hold that the owner of property in a city, which is destroyed by fire, cannot maintain an action to recover damages for its loss on the ground that the loss occurred through the failure of the company to furnish water as required by the terms of a contract with the city. Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24; Fowler *v.* Athens Water Works Co. (Ga.), 24 Am. & Eng. Corp. Cas. 626; Davis *v.* Clinton Water Works Co., 54 Iowa 59; Foster *v.* Look-Out Water Co., 3 Lea (Tenn.), 42; Atkinson *v.* Newcastle & G. Water Works Co., L. R., 2 Ex. Div. 441, rev'g L. R., 6 Ex. 404; Britton *v.* Green Bay & F. H. W. Co. (Wis.), 38 Am. & Eng. Corp. Cas. 421; Becker *v.* Keokuk Water Works (Iowa), 29 Am. & Eng. Corp. Cas. 397; Eaton *v.* Fairbury W. Co. (Neb.), 43 Am. & Eng. Corp. Cas. 370; Bush *v.* Artesian H. & C. Water Co. (Idaho), 43 Pac. Rep. 69; Howsman *v.* Trenton Water Co., 119 Mo. 304, 48 Am. & Eng. Corp. Cas. 94; Fitch *v.* Seymour W. Co. (Ind.), 37 N. E. Rep. 982; Beck *v.* Kittanning W. Co. (Pa.), 11 Atl. Rep. 300; Ferris *v.* Carson W. Co., 16 Nev. 44;

Notes

Mott *v.* Cherryvale W. & M. Co. (Kan.), 28 Pac. Rep. 989, in which case the court said; "In making such contract, the city discharges one of its duties for which it was created, and in raising the required money it only provides the consideration due from it by virtue of the contract. A water company could not proceed directly against a citizen or resident, in the first instance, for unpaid money due under the contract from the city. 'Municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available, and are essential to effectuate the purposes of the corporation; and those powers are strictly construed. The law which authorizes cities to contract with individuals and companies for the building and operating of waterworks confers no powers upon a city to make a contract of indemnity for the individual benefit of a citizen or resident of the city, for a breach of which he can maintain an action in his own name.' Under the powers conferred by the statute upon cities in this state a city making a contract with a water company to furnish water for fires, etc., is not liable to its citizens or residents on account of the failure of the company to furnish water or to perform the conditions of the contract. If a city is not liable to its citizens or residents, the water company is not liable to such citizens or residents upon a contract between it and the city. The contract, in such a case, is between the city and the water company only. Paragraphs 1401, 1402, Gen. St. 1889; Becker *v.* Keokuk Waterworks, 79 Iowa 419, 29 Am. & Eng. Corp. Cas. 397; Davis *v.* Clinton Waterworks Co., 54 Iowa 59; Vanhorn *v.* City of Des Moines, 63 Iowa, 447, 4 Am. & Eng. Corp. Cas. 339; Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24, 33 Am. Rep. 1; Fowler *v.* Athens City Waterworks Co., 83 Ga. 219; Vrooman *v.* Turner, 69 N. Y. 280; Weet *v.* Village of Brockport, 16 N. Y. 161, note; Foster *v.* Lookout Water Co., 3 Lea (Tenn.) 42; Marvin Safe Co. *v.* Ward, 46 N. J. Law, 19; Blake *v.* Ferris, 5 N. Y. 48; Exchange Bank *v.* Rice, 107 Mass. 37; Ferris *v.* Carson Water Co., 16 Nev. 44, and the cases there cited. In several cases it has been held that a city is not liable for its neglect in cutting water off from a hydrant, but for which the fire might have been extinguished. Taintor *v.* Worcester, 123 Mass. 311; New Orleans *v.* Crescent Mut. Ins. Co., 25 La. Ann. 390; Wheeler *v.* Cincinnati, 19 Ohio St. 19; Heller *v.* Sedalia, 53 Mo. 159. This action is not based upon a breach of a statutory duty, but upon the failure of the water and manufacturing company to comply with a contract made with the city of Ottawa. It is not charged in the petition that the plaintiff is a tax-payer, or has ever paid any taxes in Ottawa. It is alleged, however, that he is a citizen and resident of Ottawa, and at the time of the fire was the owner and in possession of personal

property, consisting of clothing, household fixtures, furniture, etc., of the value of $700.

"There is no claim that this is an action *ex delicto*. In support of the contention of the plaintiff, the case of the Paducah Lumber Co. *v.* Paducah Water Supply Co. (Ky.), 29 Am. & Eng. Corp. Cas. 387, is referred to. That case differs from this. In that case there was an express contract, set out in the petition, between the lumber company and the water supply company, by which, in consideration of rent paid for the use of the two hydrants on its own lot, water was agreed to be furnished directly to the lumber company. In referring to the decision in that case, Mr. A. C. Freeman, the law-writer, and one of the editors of 'The American Decisions,' says: 'that the Kentucky court took a different view and reached an opposite conclusion from the other courts by which the question has been considered and determined.' 18 Am. St. Rep. pp. 380, 381, notes. The judgment of the district court will be affirmed."

These decisions are based upon the reasoning that there is no privity of contract between the water company and the taxpayer, and therefore the water company owes the taxpayer no duty, and also, apparently, to some extent, upon the ground that the city in furnishing water for protection from fire and for the supply of its inhabitants, performs a governmental duty, for negligence in the exercise of which no liability attaches to it in favor of a taxpayer, and that the water company with which the contract is made, stands, so far as concerns the taxpayer at least, in the same position. Thus, BECK, J., who delivered the opinion of the court in Davis *v.* Clinton Water Works Co., 54 Iowa 59, said:—"The city, in exercise of its lawful authority, to protect the property of the people, may cause water to be supplied for extinguishing fires and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulation, and the like. It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government. They cannot hold such

Notes

officers and agents liable upon the contracts between them and the city." PARK, C. J., who delivered the opinion of the court in Nickerson *v.* Bridgeport Hydraulic Co., 46 Conn. 24, used a similar line of argument. He said:—"It will be observed that the plaintiffs complain that the defendants did not supply with water the hydrants which had been established by the city and the Bridgeport Water Company under their contract, to enable the city through its fire department to perform a public duty which it owed to the plaintiffs and others, to extinguish their fires. Had the plaintiffs' fire been extinguished it would have been done by the fire department; for there is no allegation in the count that the plaintiffs had hose that might have been attached to the hydrants and the fire extinguished by their own efforts. Hence, whatever benefit the plaintiffs could have derived from the water would have come from the city through its fire department. The most that can be said is, that the defendants were under obligation to the city to supply the hydrants with water. The city owed a public duty to the plaintiffs to extinguish their fire. The hydrants were not supplied with water, and so the city was unable to perform its duty. We think it is clear that there was no contract relation between the defendants and the plaintiffs, and consequently no duty which can be the basis of a legal claim."

In Fitch *v.* Seymour Water Co. (Ind.), 37 N. E. Rep. 982, it was held that the failure of a water company to supply water to extinguish fires in a city, in accordance with a contract between the company and the city would not render the company liable to an inhabitant of the city for loss sustained by him by a fire which could not be extinguished because of an insufficient supply of water. The court said: "The cases cited by appellant to show a right of action in favor of an inhabitant of a municipality against an individual or a corporation for the violation of an ordinance, of the municipality enjoining an obligation or a duty upon the individual or the corporation, are chiefly cases under police ordinances, being cases where the municipality is but an instrument for carrying out the behests of the state, or cases under ordinances for the improvement and care of streets, or like duties, being cases where the control of the municipality was such as to impose upon it an obligation which it consequently owed to the inhabitant for a neglect of duty. But the ordinance in question is not a police regulation, nor one which the municipality was under obligation to enact or enforce. Under the statute the city had a right to enact an ordinance for protection against fire, but it was not bound to do so. In enacting the ordinance the municipality moved in its governmental capacity, in general interest of the community. As a means to obtain its object, the city contracted with the company for a water supply.

Notes

The ordinance, therefore, in so far as the inhabitants of the city and the public interests generally were concerned, was a governmental measure, which the city might take, or not take, as seemed best; and no liability existed against the city for a failure to enact the ordinance or for a failure to see that it was duly enforced. There could, then, be no public duty, under the ordinance, the violation of which would render the city, or those appointed to carry out the provisions of the ordinance, liable to any one who might suffer. This we think, follows from our decisions: Brinkmeyer *v.* City of Evansvillle, 29 Ind. 262; Robinson *v.* City of Evansville, 87 Ind. 334; City of Lafayette *v.* Timberlake, 88 Ind. 380; Summers *v.* County of Daviess, 103 Ind. 262, 11 Am. & Eng. Corp. Cas. 204. It must be, consequently, that if there is liability on the part of the company, it is because of the terms of the ordinance as a contract made for their benefit, we do not think that this interest was such as gave the inhabitants the right to sue for its enforcement, or for damages occasioned by a failure to enforce it.

Under a contract to furnish water to a municipality which requires the water company to furnish direct pressure from its pumps in case of fire, the company is bound to take notice of such fires as it will be negligence not to know of, in view of its duty, its opportunities for information, and the nature of its business. Light, etc., Co. *v.* Jackson, 73 Miss. 598, 19 So. Rep. 771.

It might be inferred from the reasoning of the court in Fowler *v.* Athens Water Works Co. (Ga.), 24 Am. & Eng. Corp. Cas. 626, that where the obligation of the company arises, not under a contract with the municipality, but from a duty expressly imposed by statute, the company would be liable for the destruction of property by fire through its negligence. But in connection with this point, the decision of the English court of appeals in Atkinson *v.* Newcastle & G. R. Co., L. R., 2 Ex. Div. 441, must be kept in view. The court in that case held that the mere fact that a breach of statutory duty has caused damage does not vest a right of action in the person suffering the damage against the person guilty of the breach, and that the question whether the breach does or does not give such a right of action must depend upon the object and language of the particular statute. Accordingly, it was held that although a waterworks company was, by statute, bound to maintain a certain pressure upon its pipes for the purpose of extinguishing fires, and in consequence of its failure to do so the plaintiff's property was destroyed, the plaintiff could not recover under the statute as the penalties imposed by the statute upon the company for breach of its statutory obligation were exclusive of any other remedy to the person injured.

But in Paducah Lumber Co. *v.* Paducah W. S. Co. (Ky.), 29 Am. &

Notes

Eng. Corp. Cas. 387, it was held that under the provision of the Kentucky Civil Code that actions must be prosecuted in the name of the real party in interest, the owner of property which is taxed for water rent and which is destroyed by fire in consequence of the failure of the water company to supply a sufficient quantity of water to extinguish it, may bring an action against the company upon its contract with the city, when the contract declares that it was made for the benefit of the inhabitants of the city and for the protection of property against destruction by fire. See also Gorrell *v.* Greensboro W. S. Co., 124 N. Car. 328, 32 S. E. 720.

Destruction of Property by Negligent or Wilful Act of Person Destroying Water Supply.—Where property has been destroyed by fire by reason of the neglect or wilful act of a third person in cutting or destroying the hose which was being used by the fire department to extinguish it, such person is responsible for the damage. Thus, where a hose was necessarily laid across a railroad track, and employees of the railroad company who had knowledge of its existence, negligently ran a train across it and severed it, rendering abortive the efforts of the firemen to extinguish the fire, although they had previously promised to be successful, it was held that the railroad company was responsible. Metallic Compression Casting Co. *v.* Fitchburg R. Co., 109 Mass. 277.

Proximate and Remote Cause of Destruction.—In Patch *v.* Covington, 17 B. Mon. (Ky.), 722, the plaintiff brought an action against the city to recover the value of property destroyed by fire. He alleged that the fire originated in a small frame building adjoining his own. The court held that the proximate cause of the loss was not the insufficient supply of water, but was the fire which was communicated from the frame building, and that the city which was responsible for the water supply, was not liable for that reason. DUVALL, J., who delivered the opinion of the court, said: "It is not charged that the fire was the consequence, remote or proximate, of any act or omission on the part of the city. The legal import of the allegation is that the plaintiff's house was set on fire by the frame building: that the destruction of his property, which resulted from this cause, would, in the opinion of plaintiff, have been averted by the firemen if the cisterns had not been out of repair through the negligence of the city. It is obvious, therefore, that the cause which produced this effect was wholly disconnected from and independent of the city, or of its acts or omissions. There was neither proximity in the order of the events, nor the relation of cause and effect between the negligent omission complained of and the results which followed." As against the decisions of the court in this case must be placed the decision of the English Court of Exchequer in Atkinson

Notes

v. Newcastle & G. Water Works Co., L. R., 6 Ex. 404, in which the water company was held to be liable, KELLY, C. B., significantly asking "What kind of damage can be more a proximate consequence of the want of water than the destruction by fire of a house which a proper supply of water would have saved?" and BRAMWELL, B., remarking that it was the immediate consequence of the proximate cause. The opinion of the Court of Exchequer on this point is not affected by the decision of the Court of Appeal; L. R., 2 Ex. Div. 441, reversing it, the decision of the Court of Appeal being based on entirely different grounds. So, too, in Metallic Compression Casting Co. *v.* Fitchburg R. Co., 109 Mass. 277, where the plaintiff sued to recover damages for the destruction of his house, and founded his action upon the act of the defendant's servants in severing the hose, which was being used to extinguish the fire, the court held that the severing of the hose and the consequent destruction of the supply of water was the direct, and not the remote, cause of the loss.

It was held in Paducah L. Co. *v.* Paducah W. S. Co. (Ky.), 29 Am. & Eng. Corp. Cas. 387, that the destruction of the property of a person taxed for the payment of water rent is the natural and proximate consequence of the neglect of the water company to supply sufficient water to extinguish the fire and is sufficient to give such owner a cause of action.

Liability of City for Failure to Furnish Sufficient Supply.—When by statute a city is authorized to supply its inhabitants with water, the duty imposed thereby is discretionary with the city, and is not purely ministerial. In fulfilling such duty the city exercises governmental powers, and is not liable to a taxpayer or property owner for property destroyed by its failure to furnish sufficient facilities, or to keep the waterworks in proper repair. Wright *v.* Augusta, 78 Ga. 241; Brinkmeyer *v.* Evansville, 29 Ind. 187; Van Horn *v.* Des Moines (Iowa), 4 Am. & Eng. Corp. Cas. 339; Tainter *v.* Worcester, 123 Mass. 311; Heller *v.* Sedalia, 53 Mo. 159, 14 Am. Rep. 444; Wheeler *v.* Cincinnati, 19 Ohio St. 19; Grant *v.* Erie, 69 Pa. St. 420; Black *v.* Columbia (S. Car.), 2 Am. & Eng. Corp. Cas. 640; Foster *v.* Look-Out Water Co., 3 Lea (Tenn.), 42. But in Patch *v.* Covington, 17 B. Mon. (Ky.), 722, the court, although holding the city not liable upon the ground that the destruction of the property was not proximately caused by the failure to furnish a sufficient supply of water, appears to have assumed that the responsibility of the city in such a matter was beyond question.

In Tainter *v.* Worcester, 123 Mass. 311, it was held that a city was not liable to the owner of the building, although the water was cut off from a hydrant in the street near by on account of the owner's failure to pay water rent, when it might have been cut off from the

building alone and the building saved. A stipulation in a contract with a water company that the company shall defend and settle any suits against the city for injury to persons or property caused by the negligence and mismanagement of the company in the construction and operation of its works, does not create a new right of action and imposes no liability on the city for the negligence of the company in failing to furnish a sufficient supply of water. Van Horn *v.* Des Moines (Iowa), 4 Am. & Eng. Corp. Cas. 239.

BUCKLEY

v.

KANSAS CITY *et al.*

(*Supreme Court of Missouri, March 14, 1900.*)

Personal Injuries—Defects in Sidewalk—Liability of Municipal Corporation.*—The defendant city was not liable for personal injuries sustained by reason of defects in a sidewalk which it could not have remedied by exercising reasonable diligence; as it had neither actual notice of them, nor constructive notice from the fact that the defects had existed for such a length of time prior to the accident, that they, by the exercise of ordinary care, could have been discovered.

APPEAL by defendant city from Jackson county circuit court. *Reversed.*

Damages for personal injuries received by reason of the giving away of a sidewalk. The petition alleges that William M. Hall was the owner of premises numbered 818 Walnut street, in Kansas City, Mo.; that he had caused an areaway to be made in front of said building, under the sidewalk, and adjoining the building; that the western four feet of the sidewalk adjoining the building was constructed of iron plates, set in iron frames, and containing small glass lights, known at "prismatic lights" or "bull's eye lights," which construction was known to the city; "that said

*1 Mun. Corp. Cas., *note*, 475 *et seq.*

defendants [the city and Hall] so carelessly and negligently conducted themselves in reference to said western portion of said sidewalk in front of the entrance to the hallway of said building that the same, on the sixth day of July, 1895, and for a long time prior thereto, was carelessly and negligently suffered to be and remain in a dangerous, defective, and unsafe condition, in this: that the flanges upon which said iron plates rested on said 6th day of July, 1895, and for a long time prior thereto, were carelessly and negligently suffered and permitted to be rusted, cracked, and broken, which said defects were known to all of said defendants, or might, by the exercise of ordinary care on their part, have been known to them, and which could not be discovered with due care or caution by plaintiff; that on the 6th day of July, 1895, while plaintiff was lawfully and properly standing upon the western portion of said sidewalk constructed of iron plates set in iron frames and containing small glass lights as aforesaid, in front of the entrance to the hallway of said building, said iron plates, upon which said plaintiff was standing, gave away or fell by reason of said rusted, cracked, and broken flanges, as aforesaid, and precipitated plaintiff into said areaway"; in consequence of all which plaintiff was injured, and for which he prayed $10,000 damages from both defendants. The petition contained also a second count, based upon allegations of defective construction of the sidewalk, but upon the trial the court instructed the jury that there was no evidence to support that count. The plaintiff submitted to the ruling, and therefore it is not now here for consideration. The answer of the city was a general denial, with a plea of contributory negligence. The jury returned a verdict for the defendant Hall and against the city, and assessed the damages at $5,000. After proper steps, the city appealed.

R. B. Middlebrook and *H. S. Hadley*, for appellant.

Warner, Dean, McLeod & Holden and *Jas. G. Smart*, for respondent.

Buckley *v.* Kansas City

MARSHALL, J. (after stating the facts). The defendant relies in this court solely upon the refusal of the court to give an instruction in the nature of a demurrer to the evidence, which was interposed at the close of the whole case. This, of course, implies that, conceding the truth of everything the evidence tended to prove, with all the favorable inferences that may be reasonably and fairly drawn from it (James *v.* Association, 148 Mo., loc. cit. 15, 49 S. W. 978), there is no substantial testimony to support the verdict. To determine this question critical reference to the ultimate facts proved becomes necessary. The defendant Hall excavated the sidewalk in front of his building to a depth of 16 feet. He covered the excavation with stone up to a point within about 3½ feet of his building line. He covered the 3½ foot space with a sidewalk made of iron and glass, which was constructed in this manner: A frame of iron 7 feet in length by 3½ feet in width was set in, resting on the east side in a groove cut into the stone, and on the west side, next to the building, upon an iron girder which ran parallel with the front of the building, and on either end upon cross-beams of iron which extended from the stone to the girder, and adjoined similarly constructed sidewalks on the north and south of Hall's building. The frame was set in the groove in the stone so as to make the whole sidewalk on the same plane or level. The frame was subdivided, by cross-bars or cross-ribs of iron, into four plates made of iron, each plate being about 22 by 40 inches. These plates rested upon flanges at the sides of the frame and in the cross-bars or cross-ribs. These flanges were about an inch and a half wide. The plates had round holes in them, about the size of a silver dollar, and these holes were filled in with prismatic lights or bull's eye lights made of glass. The purpose was to secure light from the sidewalk to the cellar of Hall's building. On the 6th of July, 1895, at about 2 o'clock in the afternoon, the plaintiff was standing on this sidewalk, so composed of iron and glass, when suddenly and without warning the sidewalk gave way, and he was precipitated

into the areaway below, and seriously injured. The two north plates and the cross-beam on which they rested fell in. The cross-beam broke off close to the sides of the frame, and the flange on the frame next to the building was broken off for about 18 inches, commencing at the point where the cross-beam joined the frame, and extending towards the northwest corner of the frame. The frame and the cross-bars or cross-ribs were all molded together. For about a year before the accident the frame was broken or cracked at the corners,—that is, broken clear across the frame at the "mitre,"—and these breaks could be seen by any one standing on the surface of the sidewalk. Hall had had this sidewalk examined about a year before the accident, with a view to stopping leakage, and the cracks had been filled with oakum, pitch, and fillet. At that time the man employed by Hall to do this work discovered that a cross-beam some 10 or 12 feet south of where this accident occurred was broken. This, however, had nothing to do with this accident, for that cross-beam and that part of the sidewalk did not give way, but are still there, the broken cross-beam having been patched up with wrought iron after the accident. The testimony also showed that, although the frame was cracked at its four corners, it did not fall, but, on the contrary, remained in its place after the accident. It also appeared after the accident that the break in the flange which caused the northern plates to fall was partly an old break. Over the objection of the city, the court permitted the plaintiff to show that similar sidewalks just to the north and south of this sidewalk were out of repair, some of the cross-ribs being broken, and also permitted witnesses to testify concerning the condition of this walk, who did not see it until two or three weeks after the accident; it being, however, shown by the plaintiff that there had been no change in the condition in the meantime. There is no testimony in the case tending to show that the city had any actual notice of the condition of the sidewalk, but it was shown that the inspector of sidewalks had not inspected this sidewalk for a year

prior to the accident, and that it is at one of the most crowded corners of the city, where three street-car lines converge, and hundreds of people pass over it every day. The sidewalk was constructed in 1885, but there is no evidence in the record as to how long such sidewalks usually last, or that they are a dangerous or unsafe construction, or within what time after they are constructed danger may reasonably be expected from wear and decay of the materials composing them. The case is, therefore, reduced to very narrow limits. Counsel for the plaintiff contend: That a proper inspection by the city would have shown the danger in ample time to have repaired the sidewalk, and thereby have prevented the accident. That "the breaks at the corners of the frames," which were visible from the surface, "meant that the flange was broken at the corners, since the flange was but the underpart of the frame made so as to receive the plate. The plate (in the north end of the frame) that gave away was adjacent to two of these broken corners. The broken corners not only pointed directly to, but meant, a broken flange, the flange and frame being one single piece of iron." That the broken corners of the frame and flange destroyed the unity of the iron structure, weakened the whole, and cast a greater burden on the disconnected flanges. That an inspection from the surface of the sidewalk would have disclosed the broken corners of the frame, which should, to a reasonably prudent man, have called for a thorough inspection, either by going down into the areaway and looking up, or taking a stepladder and climbing up, so as to examine the flanges, or by lifting out the plates that rested on the flanges, and examining the flanges and the whole structure; and that the city was negligent in not so inspecting it, and therefore was guilty of negligence. On the other hand, the city counselor contends that the breaks at the corners of the frame did not impair the strength of the frame nor of the flanges; that the frame and the flanges would be just as safe if they had been made in four parts as they were when made as a unit; that the flanges were part of the frame,

and the frame was set in a groove in the stone walk on the east, in the flange on the girder on the west, and in the flanges of the cross-beams at the north and south, and were firmly held in place by the plates, which rested on the cross-ribs, and that in this manner it was impossible for the frames to get out of place, and the carrying capacity of the frames was not taxed to any greater degree than if the whole had been a unit; that the frames did not in fact give way, but remained in place after the accident, which conclusively proves that the breaks in the corners of the frame had nothing to do with the accident, and therefore were not sufficient to put the city to a greater degree of care or to a more minute inspection from below or by lifting out the plates than if no such breaks had been visible from the surface of the sidewalk.

The instructions given for the plaintiff were general in their character, and required the jury to find that the flanges were rusted, cracked, or broken, and that the accident occurred therefrom, and told the jury that it was the duty of the city to keep its sidewalk in a reasonably safe condition for all persons using the same, and that the city was liable if it failed so to do, or permitted the flanges to become rusted, cracked, or broken, and the plaintiff was injured from such failure, without fault on his part; and also defined negligence and reasonable care. Nothing was said in any of the plaintiff's instructions about the city having actual notice, nor about what constitutes constructive notice. The instructions asked by and given for the city were predicated upon the idea that the city is not an insurer of the person using its sidewalks, and that the defects in this sidewalk were hidden or latent defects, which could not have been discovered by the city officials even by the exercise of reasonable care. None of the instructions defined to the jury what a hidden or latent defect is. This case, therefore, is one not only of nondirection, but also of misdirection, and the true law must be applied to the ultimate facts proved, for there is no substantial conflict in the evidence. It is conceded that the city had

no actual notice of the defect in the sidewalk. It is not denied that the frame was broken at its four corners for about a year before the accident. It is admitted that the frame remained in its place after the accident, and that the broken cross-rib seen by the repairer about a year before the accident was 10 or 12 feet south of the place where the accident occurred, and was in no way connected with the frame in question, but remained after this part of the sidewalk fell, and in no manner had anything to do with the accident. It is uncontradicted that the city made no inspection of this much used sidewalk for at least a year before the accident, and that an inspection from the surface would not have disclosed the defect or break in the flange, but that it could only have been discovered by lifting off the plates, or by an examination from below by going into the areaway and looking up or climbing up to the flange. The crack or break in the flange is called partly an old break from the appearance it presented after the accident, but there is no evidence whatever as to how long it had existed before the accident. Neither side attempted even to adduce any evidence as to the natural or usual duration or life of a sidewalk like this, nor of how long it would be before the use would destroy its usefulness, or make it unsafe. Instruction numbered 1 given for the plaintiff authorized a verdict for the plaintiff, if the flange was "rusted, cracked, or broken," and if the city "failed to use reasonable care and precaution to keep said portion of said sidewalk in repair"; but it did not require the jury to find whether or not the city had actual knowledge of the defect, nor even to find that the defect had existed for such a length of time before the accident that the city could have ascertained the defect by the use of ordinary care. The law is settled in Missouri that a city is bound to keep the sidewalks in a reasonably safe condition for public use, and that it is liable for injuries received from defects therein of which it had actual notice, or which had existed for such a length of time prior to the accident as, by the exercise of ordinary care, it

could have ascertained, and which it had a reasonable time to remedy. Roe *v.* City of Kansas, 100 Mo. 190, 13 S. W. 404; Carvin *v.* City of St. Louis (Mo. Sup.) 52 S. W. 210; Baustian *v.* Young (Mo. Sup.) 53 S. W. 921. In the Carvin Case the plaintiff sued the city for damages caused by stepping on the top of a water meter, which misplaced it, in consequence of which her foot went into the meter. It appeared that the top was raised from a sixteenth to three-quarters of an inch above the level of the sidewalk by reason of dirt having accumulated on the flange of the meter on which the top rested. There was no evidence as to how long this condition existed before the accident, and there was no evidence that the city had actual notice. The defect was not observed by the plaintiff before she stepped on the top of the meter, nor was it calculated to attract attention. It was held—BURGESS, J., delivering the opinion of the court—that under such circumstances negligence could not be imputed to the city, and therefore a judgment in favor of the plaintiff was reversed. In the Baustian Case it appeared that the plaintiff was walking on a plank sidewalk, and when he stepped on the end of a plank it yielded to his weight, and caused him to fall, and injured him. The sleepers were rotten, and the nails were hanging down, but the immediate and proximate cause of the accident was that the ground under the sidewalk had washed out. This condition was not perceptible from the surface, but might have been discovered by an inspection from below. Neither the plaintiff nor the other witnesses who had previously passed along there had noticed it. There was a verdict for the defendant. The circuit court granted a new trial for error in an instruction. It was held—VALLIANT, J., delivering the opinion of the court—that the plaintiff had made out no case, and the judgment granting a new trial was reversed, and the cause remanded to the circuit court with directions to overrule the motion for a new trial notwithstanding the error in the instruction. In both of these cases an inspection such as the plaintiff here contends was necessary would have dis-

closed the defect, but no such inspection was made, yet it was held that the plaintiff was not entitled to recover. If all that plaintiff contends for—that the city must use reasonable care as to inspection, and must take notice of the usual and natural wear and decay of the materials composing a sidewalk—be conceded, still there is in this case a complete lack of facts or evidence to which such rules of law could be applied, for it nowhere appears that 10 years is the usual or natural life or period of duration or safety of sidewalks like this, nor within what period of time danger is to be apprehended from wear and decay. In the absence of such a showing, it cannot be said as a matter of law that the city was guilty of negligence, when there were no facts proved which showed negligence, and no circumstances in the case from which negligence could be fairly implied. Neither can it be declared as a matter of law, nor, in the absence of a showing, could the jury be allowed to find the fact to be, that cracks on the corners of the frame so increased the strain upon the flanges or cross-ribs as to impair their strength, nor that such cracks imparted notice to the city of threatened danger, and therefore called for close inspection in the manner indicated. The defects in the flanges were not patent or obvious. The plaintiff saw no danger in stepping on the sidewalk. Hundreds and thousands of other men passed over the sidewalk daily, yet none saw anything to deter them, or to put a man of ordinary prudence on his guard. The city was only bound to use such care as a person of ordinary prudence would have used under similar circumstances. It may be, as the plaintiff contends, that the cracks at the corners of the frames weakened or increased the strain on the flanges or cross-ribs; but no witness has so testified in this case, and that position lies altogether in argument here in the present state of the record. So, following and approving the Carvin and Baustian Cases, it must be held in this case that the plaintiff failed to make out a case of negligence against the city. The first instruction given for the plaintiff must also be held to be erroneous in not

requiring the jury to find that the city had actual notice of the defect in the sidewalk, or that it was of such character that the city, by the exercise of ordinary care, should have discovered it in time to have remedied it before the accident occurred. The error in this instruction was not cured by any other instruction given. Under this instruction the jury were warranted in finding a verdict against the city even if it had no actual or constructive notice, and even if the defect had existed too short a time before the accident for the city to have discovered it and remedied it. For these reasons, the judgment of the circuit court is reversed, and the cause remanded. All concur, except ROBINSON, J., absent.

CORBIN

v.

CITY OF PHILADELPHIA.

(*Supreme Court of Pennsylvania, April 17, 1900.*)

Excavation in Street Containing Deadly Gas—Failure to Give Notice of Danger—Death of Boy Attempting to Save Life of Another—Question for Jury.—Where a city, for several days, leaves a trench 28 feet deep, but into which descents can readily be made, which it has excavated in a street in a populous part of the municipality, and which it knows contains a deadly accumulation of gas at its bottom, without giving any warning of such danger, and a boy is killed by the gas while attempting to save the life of a companion, who had descended into the trench to recover a ball, it cannot be held, as matter of law, that the city is not liable for such death.

Peril Incurred in Attempt to Save Life—Contributory Negligence.* —One who voluntarily incurs peril, caused by the negligence of another, in order to save the life of one imperiled by the same negligence, is not necessarily debarred from recovery upon the ground of his own contributory negligence.

*The leading cases on this subject are cited and reviewed in the opinion of the court.

Corbin *v.* City of Philadelphia

APPEAL by plaintiff from Philadelphia county court of common pleas. *Reversed.*

Rudolph M. Schick, for appellant.

E. Spencer Miller, *Asst. City Sol.*, and *John L. Kinsey*, *City Sol.*, for appellee.

BROWN, J. The son of plaintiff lost his life in going to the rescue of an imperiled fellow being. He bravely descended into danger and found awaiting him the death from which he would have saved another. The endangered boy came back from his peril and lived. And we must now determine whether the mother of the deceased can be pecuniarily compensated for the loss she has sustained, or must be content with the consolation that her son died a heroic death. She makes a claim against the city of Philadelphia, alleging that its negligence was responsible for the damages she has suffered; and, unless sufficient proof to sustain her allegation was submitted to the jury, she cannot recover. The primary question involved is the alleged negligence of the city; for, if it was "guiltless of all wrong," it is not liable to her, and, no mattter how heroically her son may have given up his own life in going down into danger to save another, her appeal to the law to compel the appellee to compensate her is in vain. The learned trial judge, after the testimony on each side had been submitted to the jury, directed a verdict for the defendant; giving no reasons for so taking the case from their consideration. His judgment may have been that there was no sufficient evidence to establish the negligence of the defendant, or he may have thought that, even if the city was negligent, the rescuer's conduct was such as to prevent a recovery. To properly dispose of this appeal, we must pass upon both these questions, and first take up what we have said is the primary one; reviewing the evidence, in the light of which must be found the right of the plaintiff, or the immunity of the defendant.

Case Stated.

In the summer of 1896 the city of Philadelphia had dug

several trenches on the north side of Clearfield street, west of Fifth street, in an attempt to locate an old sewer that had been constructed many feet below the surface of the street. After having excavated to the depth of 28 feet, according to the testimony of John Abel, called as a witness by the city, the effort to find the sewer was abandoned, because the gas had become so strong at that depth that workmen could no longer remain at the bottom of the trenches. The clear preponderance of the testimony is that, for several days before Corbin went down to his death in one of these trenches, work had been abandoned by the city, for the reason stated; and it seems to be equally clear that the ordinary safeguards to protect the passing public from falling into these holes had not been provided, though the absence of such protection is not material in determining the questions that confront us. The plaintiff makes no claim that she lost the supporting arm of her son because he had fallen into a hole or ditch negligently left unguarded by the city, with no notice to the passer-by that a pitfall was before him; but her complaint is that, though these trenches were open and notorious, avoidable by all who traveled the street, no sign had been made, no warning given, of the death which the city knew lurked below, and to which at any time the unsuspecting might descend. These trenches had been dug in a street in a populous portion of the city. A church attended by six or seven hundred children was within a hundred feet of them, and a public-school house within a square. At the time Corbin met his death it was vacation, and the school building was closed; but the lot on the north side of Clearfield street, immediately north of these trenches, extending a whole square, from Fifth street to Sixth street, was open, having no buildings on it, and was used as a playground. Boys were constantly playing ball upon it, and on Saturdays, after the factories had closed, hundreds of tired men and boys went to it for the recreation found in their innocent games. Under these admitted conditions, the trenches were dug, and work finally suspended upon them on account of the

deadly gas that had accumulated at the bottom. This the city knew, and, apparently, for days; but it gave no notice to the passer-by of the danger in these holes, and the hundreds who congregated on the adjoining playground had no warning that it might mean to go down to death, to go after a ball which in their sports might be accidentally batted or thrown into trenches. On the afternoon of August 5, 1896, boys were playing ball on this vacant lot, and their ball rolled down into one of these trenches. Corbin, the deceased, who, with a companion, was near, said, "Let us get the ball for the poor boys," and walked over to the trench. Before reaching it, however a boy named Walker had gone down to get the ball; there having been crosspieces of wood in the trench, from side to side, making practically a ladder to the bottom. The boy Walker, after reaching the bottom, got the ball, and started to ascend; but, when he had reached the first crosspiece, fell back, with his face to the ground. Corbin then went down to his rescue, but was overcome by the gas and died. Walker revived, came to the top unassisted, and walked away.

It is insisted that the city of Philadelphia was not bound to anticipate the descent of any one into this danger, and, therefore, not negligent in failing to adopt proper means for the exclusion of all persons from these holes. We cannot sustain this view. If the city was negligent, it was liable for the consequences of its neglect, though those consequences were not, and could not by any ordinary prudence have been, anticipated. Gas. Co. *v.* Robinson, 99 Pa. St. 1. These trenches were across a public street, along which men and women daily passed, and with no notice or warning of the deadly danger below; and, with the easy means of descent, can it be seriously questioned that the city ought not to have anticipated that what did happen might happen? Ought it not reasonably to have been anticipated that, if the hat of a passer-by should be carried by the wind from his head to the bottom of one of these holes, he would most naturally go or send some one down to recover it? The veil or handker-

chief of a passing woman might be blown into the trench, and he who would not anticipate her clamor that some one go down and get it for her, and that chivalrous response would be instantly made, knows little of human nature. Under the circumstances, the city ought to have anticipated descents into these holes; but we need not conjecture what its anticipations ought to have been, for, before Walker went down to get the ball, others had been down. Stromen testifies that he went down to get a ball on the Tuesday before Corbin's death, and Roth states that he had seen a boy go down for a ball, "to the last round and get the ball." Stromen says he did not stay long, on account of the gas; that a funny feeling came over him, and he had a "hard time" getting up. Emil Hagan says he saw a boy go down before August 5th. Why should Stromen and these boys not have gone down for the ball? The amusement and recreation of playing ball were lawful, and the probabilities that the ball might be knocked or thrown into the trench were great; but the city had given no warning of the danger, and perhaps death, which, according to the testimony submitted, it must have known were at the bottom of the hole. If it is true, as has often been said, that circumstances beget duties, the duty of the city, after discovering the dangerous gas in the trenches, and its effect upon the workmen, was, clearly, to give notice and warning of it to the public, and to promptly take steps to prevent a descent into it, not unlikely to occur at any time, from causes already suggested, and others that might be mentioned.

In Hydraulic Works Co. *v.* Orr, 83 Pa. St. 332, there was a platform in a private alley communicating with a public street. This platform was raised and lowered for the convenience of the company in receiving and shipping goods, and, when not in use, was kept in place by inclining against the wall without any fastening. At the entrance to the alley were gates, which were opened and shut, as necessity required, and upon them were posted: "Private. No Admittance;" and yet, a child having strayed into this pri-

vate alley, and having been caught under the platform, which tilted over on it, in an action brought by the parents to recover damages for its death it was held that the negligence of the company was properly submitted to the jury. It was there said by CHIEF JUSTICE AGNEW: "But it has been often said duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary. The question then becomes one for a jury, to be determined upon all its facts of the probability of danger, and the grossness of the act of imputed negligence. Such was the nature of this case. This building was a factory in which several kinds of business were carried on in different stories, acquiring the use of a hoisting apparatus above, and an inclined plane below, for the easy carriage of heavy articles, machinery, etc., into and out of the factory. These appliances were approached by means of a private opening or cartway shut in by a gate, which their use required to be often opened for the ingress of wagons and hands engaged in the business. The gate and passageway opened out upon a public and much-frequented street, where persons were passing and children playing. Unlike an ordinary private alley, this passage was often open, and therefore liable to the incursions of children, and even grown persons, from thoughtlessness, accident, or curiosity. Now, the inclined way which did the injury was a dangerous trap. It was a heavy platform, weighing eight or nine hundred pounds, attached by hinges within eighteen or twenty inches of the wall, and when lowered it fell across the cartway. When not lowered, it stood upright against the wall, leaning so little beyond the center of gravity that a jar or a slight pull would cause it to fall forward. Its fall in this instance caught four children beneath it. One had his back broken, another his hands mashed, and two escaped under the cavity. It was held up by no hook or other fastening, but merely rested by its own slight weight beyond the equipoise,—ready, therefore, to catch children, like mice beneath a deadfall.

When wagons passed, it was often held up by hand, and a witness saw it fall against the wheels. Now, can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often open and exposed to the entries of persons on business, by accident, or from curiosity, owes no duty to those who will be probably there? The common feeling of mankind, as well as the maxim, '*Sic utere tuo ut alienum non lædas*,' must say this cannot be true; that this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect, on day or other, some one (probably a thoughtless boy in the buoyancy of play) would be led there, and injury would follow,—especially, too, when prompted by knowledge that a fastening was needed." In Schilling *v.* Abernethy, 112 Pa. St. 437, 3 Atl. 792, following the case just cited, it is said that circumstances may beget duties which under ordinary circumstances cannot be implied, and when such circumstances are shown to exist the question arising therefrom is not for the court, but for the jury.

Abel, the city's inspector of the sewer, and called as its witness, testifies that work had been abandoned on account of the gas; and if it be true, as testified by several witnesses called by plaintiff, that no workmen had been about the trenches for several days before Corbin's death, how can it be righteously said that the city was not derelict in its duty? On the other hand, he states that workmen were on the premises until 12 o'clock of that day; and another witness, called by the plaintiff, testifies that immediately after the death a watchman was placed at the trenches, which were filled up the next day. Abel, evidently having felt that some precaution ought to be taken by the city to guard against this danger, said that when he left the work,

Excavation in Street Containing Deadly Gas—Failure to Give Notice of Danger—Death of Boy Attempting to Save Life of Another—Question for Jury.

at 2 o'clock, about two hours before the death of Corbin, he ordered Jim January to remain at the trenches until 6 o'clock, and then light a lamp. These directions were disregarded, for no watchman was on the premises at the time of the accident. Under the facts developed on this trial, the jury should have passed upon the question of the city's negligence; and, if the learned trial judge was of the opinion that sufficient had not been submitted to sustain plaintiff's allegation that it was culpable, he was in error.

Assuming the city to have been guilty of negligence, was the conduct of Corbin such, in going to the rescue of Walker, as to prevent a recovery by the plaintiff? In other words, is she debarred from recovery because her son was guilty of contributory negligence in voluntarily incurring peril in an effort to save the life of Walker, which had been endangered by the negligence of the city? This is an interesting and most important question, but free from difficulty, in the light of reason and the thoughtful consideration it has received from many high tribunals. A rescuer—one who, from the most unselfish motives, prompted by the noblest impulses that can impel man to deeds of heroism, faces deadly peril—ought not to hear from the law words of condemnation of his bravery, because he rushed into danger, to snatch from it the life of a fellow creature imperiled by the negligence of another; but he should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence. This, conscience and reason approve, and the best judgment of thoughtful and intelligent judges has declared it to be the law of the land. Relying, as we safely can, upon the considerate judgment of other courts on this important question raised before them, we cannot better dispose of it than by calling attention to what they have said; adding in every case our approval of what was declared to be the reason of the law as announced.

Peril Incurred in Attempt to Save Life—Contributory Negligence.

We first call attention to Eckert *v.* Railroad Co., 43 N. Y. 503,—fairly regarded as the leading case upon the subject,—

and extend our endorsement to it, as well as to the authorities subsequently cited. We quote at length from this case, as follows: "The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased; and had he, for his own purposes, attempted to cross the track, or, with a view to save property, placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child, to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act, of commission or omission, wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail, and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life, that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to

receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but, when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was therefore properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion." Approving this case, the same court, in Spooner *v.* Railroad Co., 115 N. Y. 22, 21 N. E. 696, held that, if the plaintiff stepped upon the track of the railroad company in the humane effort to save younger children from danger, she was not a trespasser; and the verdict in her favor for the injury she suffered in trying to save the little children was sustained. In Gibney *v.* State, 137 N. Y. 1, 33 N. E. 142, plaintiff, with her husband and infant son, was crossing a bridge over the Erie Canal. The son fell into the canal through an opening in the railing of the bridge, which had been left unguarded. The father plunged into the canal to rescue him, and both were drowned. Plaintiff recovered for the damages she had sustained, and, in affirming the judgment of the lower court, it was held that, while the immediate cause of the peril to which the father naturally and instinctively exposed himself was the peril of the child, the cause of the peril in both cases might be attributed to the culpable negligence of the state in leaving the bridge in a dangerous condition. In this case Eckert *v.* Railroad Co. was again approved. It was held in Peyton *v.* Railway Co., 41 La. Ann. 861, 6 South. 690 that the law has so great a regard for human life that it will not impute negligence to an effort to preserve it, if the effort is made with a reasonable regard for the rescuer's own safety, and, where negligence on the part of the defendant is shown, the negligence of the person in danger cannot be imputed to the rescuer. In the case before us, under the clearly-established facts, no negligence can be imputed to Walker. The question of the contributory negligence

of a rescuer is considered in Linnehan *v.* Sampson, 126 Mass. 506, where it was contended on behalf of the defendant that the calls of humanity did not excuse him. It was held, however, that the question whether the plaintiff's conduct on the occasion of the injury was wanting in reasonable prudence and caution, in view of all the circumstances, was properly submitted to the jury as a question peculiarly for them to decide. "They were to consider all the circumstances, and, among other things, that the life of a fellow creature was in extreme danger; but they must have understood that reasonable prudence and caution were elements in the case which plaintiff must prove. * * * The emergency was sudden, allowing but little time for deliberation. Some allowance might well be made for the confusion of the moment. * * * The law does not require cowardice or absolute inaction in such a state of things. Neither does it require, in such an emergency, that the plaintiff should have acted with entire self-possession, or that he should have taken the wisest and most prudent course, with a view to his own self-preservation, that could have been taken. He certainly may take some risk upon himself, short of mere rashness and recklessness." In Donahoe *v.* Railway Co., 83 Mo. 560, it was ruled that the negligence of the company as to the person in danger was to be imputed to the company, with respect to him who attempted the rescue. It is not negligence, *per se*, for one to voluntarily risk his own safety or life in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory negligence, in an action brought by him to recover damages for injuries received in attempting the rescue, is one of mixed law and fact, and should be submitted to the jury, upon the evidence, with proper instructions from the court. While one who rashly and unnecessarily exposes himself to danger cannot recover damages for injuries thus brought on himself, yet, where another is in great and imminent danger, he who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of

danger. In such case he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment; and if he did not act rashly, and unnecessarily expose himself to danger, and is injured, the injury should be attributed to the party that negligently or wrongfully exposed to danger the person who required assistance. Pennsylvania Co. *v.* Langendorf, 48 Ohio St. 316, 28 N. E. 172, 13 L. R. A. 190. The late and well-considered case of Steel Co. *v.* Marney, 88 Md. 482, 42 Atl. 60, 42 L. R. A. 842, sustains the views expressed in the foregoing authorities; and by their "aid" it was again ruled that one who voluntarily incurs peril, caused by the negligence of another, in order to save the life of one imperiled by the same negligence, is not debarred from recovery upon the ground of his own contributory negligence. Recognizing the manifest correctness of the views expressed in the foregoing and other cases, the best text writers have properly adopted them as the law for guidance of courts and juries. When one risks his life, or places himself in a position of great danger, in an effort to save the life of another, or to protect another who is exposed to a sudden peril or in danger of great bodily harm, such exposure and risk for such a purpose are not negligent. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons. Beach, Contrib. Neg. § 15. One who imperils his own life for the sake of rescuing another from imminent danger is not chargeable, as a matter of law, with contributory negligence; and, if the life of the rescued person was endangered by the defendant's negligence, the rescuer may recover for the injuries which he suffered from the defendant in consequence of his intervention. Shear. & R. Neg. § 85.

In view of what we have said, and in the light of the authorities approvingly cited, this case was improperly disposed of by the court below, and must be sent back for

another trial, that a jury may pass upon the question of the city's negligence, and determine whether Corbin, under the circumstances, acted with a due regard for his own safety, or so rashly and imprudently that his surviving mother cannot recover for the loss she has suffered. In passing upon this latter question, it will be remembered, on the one hand, that, looking down and seeing the prostrate and motionless form of Walker, he may have been sufficiently warned not to descend into the danger, and his conduct may have been so rash and imprudent that, in the judgment of the jury, there ought not to be a recovery. On the other, it will not be forgotten that he had no time for deliberation, and was bound to act, if at all, instantly, as a moment's delay might have made his going down too late. And it will be still further remembered that, shortly before the day of his death, others had gone down into the trenches and returned unharmed; that the very boy whom he would have saved came back unaided from the bottom of the hole; and that those who went down for him came up uninjured. What the verdict of the jury should be, it is not for us to say, and we do not pretend to intimate. Our duty is simply to direct that, intelligently instructed, they pass upon the questions involved. Theirs will be to render a just finding.

It is finally contended on behalf of the city that it is not liable, because the alleged negligence was that of an independant contractor. As to this defense, it need only be said that, under the evidence offered by the city itself, it is without merit. For the reasons given, the judgment is reversed, and a *venire facias de novo* awarded.

MITCHELL, J. (dissenting). I cannot see that the city was guilty of any negligence that contributed to the accident. It had obstructions around the ditch sufficient to indicate that the place was dangerous. If one had fallen in at night, the obstructions might be held insufficient; and it may even be admitted, so far as this case is concerned, that if one going down in daytime, with only the apparent risk of the descent before him, had ignorantly encountered

the gas, he might have had an action for negligence in failing to warn him of the concealed danger. But any such negligence is wholly irrelevant to this case. Corbin saw the danger from the condition of the boy Walker, went into it knowingly, and would not have been deterred by a warning placard, however specific. There is, therefore, in my view, only one question in the case, and that is whether the circumstances exonerated Corbin from the ordinary legal consequences of his act. I cannot see how the goodness or humanity of his motives can either exempt him, or transfer the risk he ran to the city. It is a clear case for the application of the principle, "*Volenti non fit injuria.*" If a known danger is encountered in the performance of a specific duty, as in the case of risks taken by a fireman or a policeman, a different question is presented; but there was nothing of this kind here, for Corbin was a pure volunteer. I have read the opinions cited by my Brother BROWN with close attention, to discover from them some recognized principle of law to sustain the results arrived at. But I find nothing beyond an emotional basis of admiration for heroism, very creditable to human nature, but having no proper place in the administration of justice. I would therefore affirm this judgment, both on the absence of any negligence by the city which contributed to the accident, and on the voluntary character of Corbin's assumption of a known risk.

GREEN, C. J., and FELL, J., join in this dissent.

CARLISLE *et al.*

v.

WILSON *et al.*

(*Supreme Court of Georgia, May 16, 1900.*)

Streets—Prescription—Petition for Removal of Obstruction.*— A passageway connecting a city lot with a public street, although originally laid out as a private way, became a public street by the continuous use thereof by the public as such for thirty years, and by having been kept in repair and free from obstructions by the municipal authorities. Consequently, the governing body of such municipality had jurisdiction to entertain a petition filed by an abutting property owner to have removed from across such street a fence which obstructed the passage.

(Syllabus by the Court.)

ERROR by defendant from Troup county superior court. *Affirmed.*

E. T. Moon and *J. H. Cotter*, for plaintiffs in error.

Frank Harwell, for defendants in error.

COBB, J. Complaint was made to the city authorities of La Grange that certain persons had caused an obstruction to be placed in one of its public streets, and after a hearing the mayor and council decided that the way obstructed was a public street of the city, declared the obstruction a nuisance, and ordered the same abated. The case was carried by *certiorari* to the superior court, where the judgment of the mayor and counsel was affirmed. To this judgment the respondents in the proceeding before the mayor and council excepted. The evidence, though conflicting, authorized a finding that the way in question, although in all probability originally

*See generally Moffatt *v.* Kenney (Mass.), 2 Mun. Corp. Cas. 727, and *notes*, 731 *et seq.* See also Town of Johnson City *v.* Wolfe, *ante* 349, and *notes*, 354 *et seq.*

laid out as a private way, had become, by continuous user for a number of years, dedicated to the public, and that the city authorities had from time to time, by having repairs made and removing obstructions, recognized the same as one of the streets of the city. Such being the case, the mayor and council had undoubted jurisdiction to entertain an application to abate a nuisance caused by the obstruction of the street. The judge did not err in overruling the *certiorari*. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

PARISH

v.

BAIRD *et al.*

(*Court of Appeals of New York, Oct. 3, 1899.*)

Injury to Sidewalk—Rights of Abutter.—An abutting owner may recover damages for injury to the sidewalk in front of his property, where it was built at his expense, in discharge of a duty or obligation imposed upon him by law, although it is in the public street, and not upon his land.

Same—Vaults—Rights of Abutter.—A vault under such a sidewalk is a part of an easement appurtenant to the abutting property, which the abutting owner may protect as fully as any other property.

Measure of Damages.—In an action by an abutting owner for injuries to such a sidewalk the measure of damages is the cost to plaintiff of restoring the walk to its condition before the injury.

Expert Testimony.—The opinions of witnesses as to matters not involving any questions of science or skill are not admissible.

Same.—A witness must be shown to be an expert before he can be allowed to give expert testimony.

APPEAL by defendant from First department appellate division supreme court. *Affirmed.*

John C. Shaw, for appellant.

Thomas P. Wickes, for respondent.

Parish *v.* Baird

O'BRIEN, J. The plaintiff recovered damages for an injury to the real property of the testator, for which it was held that the defendant was responsible. It appears that the deceased owned a valuable building, used for a store and offices, at the northeast corner of Seventeenth street and Broadway, in the city of New York. The building had been constructed with vaults extending out under the sidewalk of Seventeenth street, by permission from the city authorities. Over the vaults the owner had constructed a sidewalk of stone flagging, consisting of large, flat stones specially made, prepared, and finished for that purpose. Those stones had to be fitted together with considerable care and exactness, in order to make a sidewalk that would be both useful and ornamental. The walk was supported by iron beams and girders extending across the vault, supported by iron columns and brick arches. In the year 1893 the defendant was engaged in repairing the street or roadbed in front of this building, under a contract with the city which required him, before disturbing or making any alteration in the old roadway, to haul upon the line of the work, at certain points to be designated, a "sufficient quantity of stone blocks and bridge stones for the paving of at least the space between any two intersecting streets," and permitted him, after the inspection of such stones, to pile the same on the sidewalks along the line of the work. The testimony on the part of the plaintiff tended to show that the defendant, before beginning the work, caused the stones to be used in paving the street in front of plaintiff's premises to be brought upon the ground, but instead of unloading such stone in the street, and then piling the same "neatly on the front of the sidewalk," as he was required by his contract to do, he caused the same to be thrown or pitched to the sidewalk from the heavy two-horse wagons which brought them. After several loads had been brought, the defendant's employees piled up a wall of the stone near the building and another wall along the curb line,

Case Stated.

thereby making a large bin, which they filled with other stones brought afterwards, and thrown in as before. It was observed by the plaintiff's agent and by others that this proceeding was injuring the sidewalk. The plaintiff's agent notified the parties in the employ of the defendant that they were injuring the sidewalk by the manner in which they were unloading the stones and piling them on the walk, but no attention was paid to this. Before the walk was used for unloading the stone, and as a place for piling them, it was in substantially the same condition as when first laid, but when the paving blocks were removed it was found to be injured. Some of the flagstones were found to be broken, and the joints, which were originally cemented, were in some cases opened. All this, it was claimed, resulted from the acts of the defendant, either in unloading the heavy blocks of stone with too much violence, or in placing too great a weight upon the walk. The case seems to have been tried upon the theory that there was negligence on the part of the defendant in unloading and piling the stone, and upon that theory it was submitted to the jury, and a verdict for the plaintiff was found. The judgment was affirmed at the appellate division, and the decision was unanimous. On the question whether the proof sustained or tended to sustain the verdict, we are concluded by this decision. The defendant must, upon this appeal, rely upon his exceptions at the trial directed to other questions than the sufficiency of the evidence to carry the case to the jury.

It is true that the walk was in the street, and not upon the plaintiff's land, and it may be that he could not sell or remove it; but, as between himself and the city, he was primarily liable for its construction and maintenance. It was built at his expense, in the discharge of a duty or obligation imposed upon him by law. It must be maintained at his expense, and hence the destruction of it or any injury to it by the wrongful or negligent act of another is the plaintiff's

Injury to Sidewalk—Rights of Abutter.

loss, and, so far, an injury for which he may demand redress.

Same—Vaults—Rights of Abutter.

Moreover, the vault over which the walk was laid, and of which it was a part, was an easement appurtenant to the plaintiff's property, and in itself a species of property, which the plaintiff may protect as fully as any other property. Hence the plaintiff may recover damages from any one negligently injuring the walk, rendering its repair or rebuilding necessary. Bidleman *v.* State, 110 N. Y. 232, 18 N. E. 115; Rogers *v.* Randall, 29 Mich. 41; Trustees *v.* Foster, 156 N. Y. 354, 50 N. E. 971. The measure of damages for an injury of this character is the cost to the owner of the building of restoring the walk to its original condition, and proof of that fact was properly received. Hartshorn *v.* Chaddock, 135 N. Y. 116, 31 N. E. 997; 3 Suth. Dam. 1883, p. 373.

Measure of Damages.

The defendant called a witness, and asked him to give an opinion as to whether it would be possible to break the flagstones on the walk, if they had been laid as described and were of good material, by piling the stones upon it. The answer was excluded, under the objection of plaintiff's counsel. There was no error in this ruling. Whether the damage to the walk was the result of the use made of it by the defendant in unloading and piling the granite blocks upon it, or whether it resulted from some other cause, was a question to be determined by the jury, and it did not involve any question of science or peculiar skill, calling for expert testimony; but, even if it did, the witness was not shown to be an expert. There was some other proof offered by the defendant, and excluded, calling for the opinion of witnesses, not shown to be experts, as to the probable cause of the injury to the flagstones in the walk. The questions all called for an opinion on the point whether the damage could have resulted from the use of the walk by the defendant, or from some defect in the construction of the same or the material used. There was no error in the ruling

Expert Testimony.

Same.

excluding the answers to questions of this character. They did not call for any fact bearing on the question, but the bare opinion of the witness. There are no other exceptions in the case that require notice, and so the judgment should be affirmed, with costs. All concur, except PARKER, C. J., not sitting. Judgment affirmed.

In re MELON ST.

APPEAL OF CITY OF PHILADELPHIA.

(*Supreme Court of Pennsylvania, July 19, 1899.*)

Right to Appeal.—While this was nominally an appeal from the court of quarter sessions of Philadelphia to the superior court, and there certified to the supreme court, it was in reality, with the unimportant exception of correcting (in the interest of the appellant city; a clerical error an appeal from the final judgment of the supreme court, and was, therefore, quashed.

Vacation of Street—Validity—Estoppel.—After a city has acquiesced in the expense and permanent improvement by a railroad company on a vacated portion of a street, and has demanded and received from the company a stipulation against claims for damages, etc., on account of the vacation, it is estopped from asserting the illegality of the vacation.

APPEAL by city from Philadelphia county court of quarter sessions. *Appeal quashed.*

Francis L. Wayland, *Asst. City Sol.*, and *John L. Kinsey*, *City Sol.*, for appellant.

Frank M. Cody, *M. Hampton Todd*, and *William H. Staake*, for appellees.

STERRETT, C. J. While this is nominally an appeal from the court of quarter sessions of Philadelphia to the superior court, and thence certified here, it is in reality an appeal from the final judgments of this court in *Re* Melon St. (Appeal of Stadelman) 182 Pa. St. 397, 406, 38 Atl. 482, entered in that court in obedience to our mandate. In that regard, as the records will show, the case is certainly

Case Stated.

sui generis. In its inception, the last-mentioned case was a proceeding in the court of quarter sessions of Philadelphia by the owners of certain properties on Melon street, in said city, for the assessment of damages alleged to have been sustained by them, respectively, in consequence of the vacation of a part of said Melon street, between Ninth and Tenth streets. The matter was there so proceeded in that the viewers duly appointed by the court found and reported that said claimants had sustained damages to the extent of the several sums awarded to them, respectively, as specified in the schedule annexed to and made part of their report, amounting in the aggregate to $9,750. They further found that the Philadelphia & Reading Terminal Railroad Company was specially benefited by said vacation "to an amount not less than $9,750"; and they therefore reported "that, in their opinion, the said claimants are entitled to the sum of $9,750, above awarded as damages; and they assess and apportion the whole of said sum of $9,750 against the said the Philadelphia & Reading Terminal Railroad Company." Exceptions were duly considered and dismissed, and thereupon the report of the viewers was confirmed by the court. According to the practice in this and other districts, an absolute confirmation such as that has all the force and effect of a definitive decree or judgment of the trial court that the claimants are entitled to recover from the city as their damages, etc., the several sums found and awarded to them, respectively, by the viewers, and that the said railroad company pay the amount assessed against it as benefits, etc. The company, evidently treating the confirmation as a definitive decree or judgment, appealed therefrom to the superior court; and on December 18, 1895, said court reversed the judgment of the court below and set aside the report of the viewers at the costs of the appellees. *In re* Melon St., Appeal of Philadelphia & R. Terminal R. Co., 1 Pa. Super. Ct. 63, 86. From that judgment of reversal, Jacob L. Stadelman and others, to whom damages were awarded by the viewers and court of quarter sessions, forthwith appealed to this court; and on October 11, 1897, in an

opinion by our Brother FELL, the judgment of the superior court in each of said appeals by the claimants was reversed, but, instead of remitting the records, in the usual way, to the court below, a special order was made, the purpose of which sufficiently appears in the last paragraph of the opinion, as follows: "It was error on the part of the jury to include in their awards damages caused by the vacation of a part of Ninth street. As suggested in the opinion of the superior court, this error may now be corrected by the filing of releases. The judgments are reversed, and the records are remitted to the court of quarter sessions of Philadelphia, with directions to enter judgments for the appellants upon the filing of proper releases." It will thus be seen that the only object in requiring releases (of damages caused by vacation of a part of Ninth street) to be filed by those in whose favor our judgments of reversal, etc., were directed to be entered on the record of the trial court was to insure the correction of the above-mentioned error. To that end, the filing of releases was made a condition precedent to the entry of our judgments in favor of the respective appellants. The same purpose might have been accomplished by entering our judgments here in favor of each, with stay of execution until release was filed in the court below, and then, remitting the record, in that form, to said court; but the form adopted was deemed the better, and should have occasioned no trouble. The contemplated releases appear to have been filed, and judgments were then entered for the proper amounts; but the form in which the latter entries are made is inappropriate. They should have been so worded as to distinctly show upon their face that they are respectively the judgments of this court, entered in the trial court, not of its own motion, but upon the express mandate of this court. That, however, is merely a clerical error, and should be corrected. The records were obviously remitted by this court for no other purpose than the correction of said error, and then the entry of our final judgments for the purposes of execution, etc. The court of quarter sessions had no other

authority in the premises than to see that proper releases were filed, and then enter the judgments as directed by us. When thus entered, those judgments were in that court for the purposes of execution in appropriate form and under its direction. Manifestly, they were not, and could not have been, intended to be judgments of the court of quarter sessions, from which an appeal would lie to the superior court. As we have already seen, the final judgment of that court had theretofore been entered by dismissing the exceptions and confirming absolutely the report of the viewers. Then, on appeal to the superior court by the railroad company, that judgment was reversed, and the report of the viewers was set aside; and subsequently, on appeal to this court, the judgment of the superior court was reversed and set aside, and the records "remitted to the court of quarter sessions, with directions to enter judgments for the appellants upon the filing of proper releases." That direction was practically complied with by the court below; but the informal manner in which our judgments were there entered appears to have had the effect of leading the appellant in the present case into the grave mistake of supposing that the final judgments thus entered, pursuant to our mandate, were judgments of the court below, and accordingly the present appeal was taken therefrom to the superior court. With the unimportant exemption of correcting (in the interest of the present appellant) the error above mentioned by requiring releases to be filed, the final judgments of this court are practically an affirmance of the judgment or decree of the court of quarter sessions from which the first appeal was taken.

Right to Appeal.

When the present appeal came on to be heard in the superior court, the appellees' motion to quash was considered, and the court in its opinion, reported in 9 Pa. Super. Ct. 18, 22, rightly held "that the motion to quash should prevail," but, in view of the novelty of the proceeding, and for reasons given in its said opinion, the court very properly

determined that its duty was to certify the case to us under section 10 of the act of June 24, 1895 (P. L. 212), which provides: "If any four of the judges of the superior court, whose duty it is to decide any matter before that court, shall certify that, in their judgment, the questions involved in any case are so difficult or important as to make it expedient that the case should be decided by the supreme court, the case containing such questions shall be certified to the supreme court for full consideration and decision, though otherwise within the exclusive jurisdiction of the superior court, but such certification shall not be made until after the case shall have been heard and decided, and the opinion of the court and any dissents therefrom shall have been duly filed." The case was accordingly certified in due form, together with a copy of the opinion, etc., 9 Pa. Super. Ct. 18. From what has been heretofore said it necessarily follows that the superior court was right in holding, as we must do, that the motion to quash the appeal should prevail; and as, already intimated, we have no doubt that, in the circumstances, the certification of the case to this court was entirely proper.

It is not our purpose, nor is it at all necessary, to reconsider any of the questions involved in the first appeal to the superior court, and thence to this court. For reasons given in the opinion of our Brother FELL, we are fully satisfied as to the correctness of our conclusions in those cases. All matters pertaining to the rights of the respective claimants to recover the damages found by the viewers, and adjudged by the trial court to have been sustained by them, respectively, and also all matters pertaining to benefits, and the assessment thereof against the Philadelphia & Reading Terminal Railroad Company, were considered and finally passed upon by us in the appeals to this court. These matters, together with any other relevant matters which the parties, or either of them, may have waived, by omission to present them at the proper time, must now be regarded as *res adiudicata*. It is now too late to even suggest, as has been done by the present appellant, that the part

of Melon street referred to has never been legally vacated. It is not only too late, in point of time, to interpose any such technical defense, but the acquiescence of the city in the expensive and permanent improvement made by the railroad company, and its demanding and receiving from said company a stipulation against claims for damages, etc., are quite sufficient to forever estop it from asserting that the said vacation was unauthorized and illegal. Neither individuals nor municipal corporations can ever be permitted to thus play "fast and loose." Having been definitively adjudged that the appellees in this case are entitled to recover from the city the sums legally awarded to them, respectively, as damages, etc., if payment thereof is longer withheld from them unnecessarily, it will be the duty of the court below to award and enforce appropriate execution process for the collection thereof. Owing to the peculiarities of this appeal, we have been induced to digress somewhat from the motion to quash, and refer to some matters which relate more particularly to the merits of the cases, upon which we have heretofore finally acted, and which are no longer open for discussion. This has been done with the view of avoiding, if possible, any futher misunderstanding as to the status of our judgments in Appeal of Stadelman, 182 Pa. St. 397, 38 Atl. 482. It is ordered that the appeal in this case be, and the same is hereby, quashed, at the costs of the city of Philadelphia, appellant; and it is futher ordered that the record be remitted to the court of quarter sessions of Philadelphia with instructions (1) to so amend its record entries of the judgments in favor of the present appellees that they may more clearly appear to be the judgments of this court, entered in pursuance of our mandate of October 11, 1897, to do so "upon the filing of proper releases," and (2) to take such futher appropriate legal proceedings as may be necessary and proper to enforce payment of said judgments.

Vacation of Street—Validity —Estoppel.

PURINTON

v.

INHABITANTS OF TOWN OF SOMERSET.

(*Supreme Judicial Court of Massachusetts, Nov. 29, 1899.*)

Construction of Street Railway—Injury to Abutting Property—Liability of Municipality.—A municipality is not liable for damages to property by reason of the lowering of the highway in front of it by a street-railway company, acting under a franchise properly granted by the selectmen of the municipality.

EXCEPTIONS by plaintiff from Bristol county superior court. *Exceptions overruled.*

J. C. Blaisdell, for plaintiff.

F. S. Hall, for defendant.

LATHROP, J. The plaintiff seeks to recover damages sustained by him in his property by reason of the lowering of a public highway in front of his land in the defendant town. The lowering was done by a street-railway company, acting under authority of a franchise granted it by the selectmen of the defendant. The bill of exceptions does not state when this was done, although it was stated at the argument that it was before St. 1898, c. 578. It was not disputed at the argument that the selectmen acted within their authority in granting the franchise, and it was admitted that the case did not come within Pub. St. c. 52, § 15. Under these circumstances, we see no ground for holding the defendant liable. Callender *v.* Marsh, 1 Pick. 418; Brown *v.* City of Lowell, 8 Metc. (Mass.) 172, 175; Sisson *v.* City of New Bedford, 137 Mass. 255; Sullivan *v.* Fall River, 144 Mass. 579, 585, 12 N. E. 553. Exceptions overruled.

TOWN OF ST. LAWRENCE *et al.*

v.

GROSS.

(*Supreme Court of South Dakota, Jan. 10, 1900.*)

Right of Taxpayers to Enjoin Owner from Removing House out of Town.—The fact that the removal by a property owner of a building out of the town limits will increase the rate of taxation of the remaining taxpayers is not ground for the granting of any injunction restraining the removal at the instance of such taxpayers and town.

APPEAL by plaintiffs from Hand county circuit court. *Affirmed.*

Wilmarth & Simmons, for appellants.

S. V. Ghrist, for respondent.

CORSON, J. This is an appeal by the plaintiffs from an order sustaining a demurrer to the complaint. The action was brought to obtain an injunction to restrain the removal by defendant of a certain brick building from the town of St. Lawrence. The facts as alleged in the complaint may be briefly stated as follows: That the town of St. Lawrence is a municipal corporation, and within the corporate limits there are 1,200 acres of land, of which not over 240 acres are platted; that the defendant is the owner of a certain two story brick building situated in the town of St. Lawrence, and is now making preparations to remove the same to the town of Miller; that said building has a basement 8 feet in depth, excavated from the line of the sidewalk 14 feet into the street under the sidewalk, and that, if said building is removed it will leave a deep and dangerous excavation and pitfall endangering the safety of the traveling public; that said building was constructed in 1889 at a cost of $5,000; that the assessed value of all the real property within the corporate limits of the

town of St. Lawrence for the year 1887 was $46,297, and the value of the personal property was $63,268; in 1899 the assessed value of the real property within the corporate limits of said town was $19,267, and of the personal property, $6,706; that during the year 1889 eight buildings, of the value of $9,000, were destroyed in said town by fire, and subsequently an elevator and a mill, of the value of $20,000, were so destroyed; that since 1886 fifty-two buildings have been removed from said town, which were of the value of $25,000, and no other buildings have been built to replace them; that during the year 1886 said town issued bonds in the sum of $4,400 for the purpose of constructing waterworks, and in 1894, together with the township of St. Lawrence, issued $11,000 in bonds for the purpose of constructing artesian wells, under the irrigation act of 1891, and there is now outstanding and unpaid $3,400 in town warrants, upon which a large amount of interest has accrued; and in 1885 school bonds to the amount of $3,000 were issued; that to pay the interest upon said bonds it is necessary to levy and collect an annual tax of $700; that the plaintiffs Taylor, King, and Davey are residents and taxpayers of the town of St. Lawrence, and are owners of real property therein. Plaintiffs futher allege that if defendant's building is removed, the taxes which must necessarily be paid by the taxpayers of said town will be much increased, and that by the removal of defendant's building the taxes of the plaintiffs and other taxpayers similarly situated will become burdensome, intolerably excessive, and amount practically to a confiscation of their property; that said town of St. Lawrence, if this and other buildings in contemplation of removal are removed, will be unable to levy and collect sufficient taxes to meet the running expenses of said town, its proportionate share of the school expenses, and meet the principal and interest of its bonded indebtedness, and, if said buildings are allowed to be removed, it will seriously impair the ability of the town to pay the principal and interest of its bonded indebtedness; that the plaintiffs have no adequate and speedy remedy at

law; and that the facts herein stated were known to the defendant at the time he purchased the building herein described. Wherefore plaintiffs pray for an order enjoining the defendant from removing such building until such time as the bonded and warranted indebtedness of the town shall be entirely paid.

One of the grounds upon which plaintiffs' complaint seems to be based is that the removal of the building by the defendant will create a nuisance by leaving a dangerous, unfilled excavation under the sidewalk and a part of the street. So far as the complaint is based upon that theory, it is sufficient to say that there is no allegation in the complaint that he threatens or intends to leave his premises in a dangerous condition. It is to be presumed, therefore, that upon the removal of the building he will cause the basement to be made secure and safe for the public.

Appellants further contend that the removal of this building from the town of St. Lawrence will so far diminish the taxable property in said town as to render it difficult for the town to meet its current expenses and the principal and interest of its indebtedness, and it will largely increase the burden of taxes of the remaining residents of said town and township, and that the taxpayers in said town have such an interest in retaining the taxable property within the same as to enable them to maintain this action. The appellants do not claim that the indebtedness of a municipal corporation, either bonded or floating, creates a lien upon the property of individuals within the municipality, but do claim that the property of the respondent within the town of St. Lawrence, as soon as the bonds were issued, became subject to and was liable for its proportionate share of all bonds issued by the town, and that said property was purchased by the defendant with the fraudulent intent of removing the same from the town of St. Lawrence for the purpose of avoiding payment of the taxes that might be assessed thereon. The learned counsel for the appellants have not referred the court

to any adjudicated cases sustaining their position, and the court, in its own researches, has not been able to find any.

Counsel for appellants have also failed to point out under what head of equity jurisprudence their complaint can be sustained. It is true, courts of equity will protect property of one against unlawful invasion by another where irreparable injury may result from such invasion, but those courts do not undertake to relieve parties in all cases who may suffer from the acts of another. It is only when a party has done some wrongful act which injures another that courts of equity will grant to such injured party relief. The law seems to be well established that the owner of real property not incumbered by any liens may dispose of such property in any manner that he may deem proper, and that he has an undoubted right to sell or remove any building constituting a part of the realty, usiug care that in removing said building he does no injury to the person or property of another; and hence, in removing his building from the town of St. Lawrence, defendant will do no wrongful act of which the town or taxpayers have a right to complain. *In re* Utica, C. & S. V. R. Co., 56 Barb. 456–460. It is certainly a novel claim that parties having no interest in or lien upon the property of the defendant have the right to restrain him from removing his building to a locality where he may desire to rebuild the same. It may be unfortunate for the plaintiff taxpayers that by the removal of this building their taxes may be increased, but it is one of those incidents in the ownership of property for which neither courts of law nor courts of equity afford a remedy. It is quite clear, therefore, that the municipality of the town of St. Lawrence and the taxpayers therein cannot maintain this action. Neither the town of St. Lawrence nor the taxpayers have any right to insist that parties who were the absolute owners of property in such town when the indebtedness of said town was incurred shall continue as owners of such property, or that purchasers of the same shall continue to keep it in the same

condition it was when the indebtedness was incurred. We fail, therefore, to discover any law, legal or equitable, upon which this action could be maintained.

It is contended by appellants that this case comes within the principle by which proceedings of municipal corporations at the suit of citizen taxpayers, where such proceedings encroach upon private rights, are restrained. But courts of equity exercise their jurisdiction in such cases on the ground that the municipality is charged with, and made the depositary of, a public trust, and that by the performance of the threatened acts they are violating such trust. High, Inj. § 1236. The owner of property within a municipality sustains no such relation to the municipality or the taxpayers therein. We are of the opinion, therefore, that the court was clearly right in sustaining the demurrer. The order of the circuit court is therefore affirmed.

ADKINS *et al.*

v.

CITY OF RICHMOND.

(*Supreme Court of Appeals of Virginia, Feb. 8, 1900.*)

Appeal—Jurisdiction.—To call forth the jurisdiction of the court of appeals upon the question of the constitutionality of a law or municipal ordinance, it is not necessary that it specially appear in the record by some appropriate plea or other proceeding that such question was raised and decided in the lower court, but such jurisdiction may arise from any proceeding which necessarily puts the constitutionality of such law or ordinance in issue, whether it be a demurrer, plea, instructions, or otherwise.

Licenses—Brokers—Interstate Commerce.*—A license tax imposed by a city on a broker whose business is confined to selling by sample and personal application, for nonresident principals exclusively, goods belonging to them in another state, for the purpose of introducing them into the state, is a regulation of interstate commerce and beyond the city's power.

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*See *In re* Tinsman (Cal.), 2 Mun. Corp. Cas. 439, and *note*, p. 445; Chrystal *v.* Macon (Ga.), 2 Mun. Corp. Cas. 445; City of Buffalo *v.* Reavey (N. Y.), 1 Mun. Corp. Cas. 83, and *note*, p. 88.

Adkins *v.* City of Richmond

ERROR by defendant to Richmond hustings court. *Reversed.*

S. S. P. Patteson, for plaintiffs in error.

H. R. Pollard, for defendant in error.

RIELY, J. The question involved in this case is the validity of the license tax imposed by the city of Richmond upon the plaintiff in error as a merchandise broker, and for the nonpayment whereof he was prosecuted and fined. Case Stated.

It was objected by the counsel for the city that this court was without jurisdiction of the case, upon the ground that the record does not specially show that the tax was impugned on constitutional grounds. We are not aware of any requirement that it must specially appear in the record by some appropriate plea or other proceeding that the consitutionality of an act of the legislature, or an ordinance of a municipal corporation, or of any other matter involved in the litigation, was raised and decided by the lower court in order to call forth the jurisdiction of this court upon that ground. On the contrary, the constitutionality of law has been repeatedly passed upon on a general demurrer to the pleading in the lower court, and even where the question was raised for the first time in the petition to this court for the writ of error. Speer *v.* Com., 23 Grat. 935; McCready *v.* Com., 27 Grat. 985; Brown's Case, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110; and Southern Exp. Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436. Appeal—Jurisdiction.

The jurisdiction of this court must affirmatively appear from the record, but it does so appear when the court can see that the judgment of the lower court necessarily involved the consitutionality of some statute or ordinance, or drew in question some right under the federal or state constitution. Any proceeding which necessarily puts its validity in issue, whether it be a demurrer, plea, instructions, or otherwise, is sufficient to give this court jurisdiction of the case.

The authorities relied upon by the counsel for the city for

his contention were all, with a single exception, cases of the supreme court of the United States, where the rule invoked unquestionably prevails, but that is because that court by express statute has jurisdiction to review a judgment of a state court only when the record shows that some right under the federal constitution or authority of the United States was "specially set up or claimed," and denied by the state court. Chicago & N. W. R. Co. *v.* City of Chicago, 164 U. S. 454, 17 Sup. Ct. 129, 41 L. Ed. 511; Oxley Stave Co. *v.* Butler Co., 166 U. S. 648, 17 Sup. Ct. 709, 41 L. Ed. 1149; and Rev. St. U. S. § 709.

Upon the trial of the case the plaintiff in error asked the court to instruct the jury as follows:

"If they shall believe from the evidence that Thomas Adkins, trading under the name of Thomas Adkins & Co., only carried on business as a resident sales agent for nonresident principals, and that his employment is exclusively confined to representing nonresident principals in the negotiations of the sales of goods which are in other states, then they must find for the defendant Adkins." But the court refused so to instruct the jury, whereupon a bill of exceptions was duly taken to its ruling.

While the instruction does not, in terms, refer to the commerce clause of the federal constitution, it is manifest that the defendant intended by the instruction asked for to invoke its protection, and that the court, by refusing to give the instruction, decided that the business of a resident sales agent, though limited exclusively to nonresident principals, was not within the protection of article 1, § 8, cl. 3, of the constitution of the United States. This was the question presented to and decided by the lower court against the contention of the defendant. The record, therefore, shows affirmatively that the validity of the tax was directly drawn in question, and that this court has jurisdiction of the case.

The evidence in the record shows that the plaintiff in error is a citizen and resident of the city of Richmond, Va.; that his occupation is soliciting orders in Richmond by personal

application and by the exhibition of samples solely for nonresident merchants, who are his principals; that his employment is confined exclusively to the negotiation of sales of goods which are not in the state of Virginia, but in other states; that for the period for which the license tax was assessed against him, and for a long time prior thereto, he had not conducted any other business; that when he secures an order he reports it to his principal, who, if the sale and credit are satisfactory, fills the order by shipping the goods to the resident merchant; that no settlements are made through the agent, but by the resident merchant directly with the agent's nonresident principals, who remit to him the small commission which is his compensation for negotiating the sale; and that he has no storehouse or warehouse, but simply rents a room in the city of Richmond, in which he keeps his samples and conducts his correspondence.

The tax which the defendant refused to pay, and for the nonpayment whereof he was prosecuted and fined, was imposed on him under an ordinance of the city prescribing a license tax for the privilege of prosecuting the business of a broker. The ordinance does not define the term "broker," or explain the sense in which it was used. A commerical broker is defined in the revenue statutes of the state to be, among other things, one who negotiates the sale of merchandise without possession or control of it as commission merchants have of it in their business (Acts 1889–90, p. 226, c. 244, § 64); and a broker, without special designation, is defined in the text-books to be "an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation, for a compensation commonly called 'brokerage.' " Story, Ag. § 28, and 4 Am. & Eng. Enc. Law (2d Ed.) 960.

Tested by these definitions, the defendant was conducting the business of a broker in the city of Richmond, in violation of its ordinance, in that he had not paid, and refused to pay, the license tax required for the privilege of prosecuting such business. The question is, therefore, directly presented

whether the ordinance under which the tax was assessed against him is, as respects the special and limited business of a broker, followed by the defendant, a regulation of interstate commerce, and therefore void, on account of its repugnancy to article 1, § 8, cl. 3, of the federal constitution.

The supreme court of the United States, which is the authoritative and final arbiter of all questions arising under the constitution of the United States, has repeatedly declared that "no state has the right to levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on receipts from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress." Lyng *v.* Michigan, 135 U. S. 165, 10 Sup. Ct. 725, 34 L. Ed. 128, and Leloup *v.* Port of Mobile, 127 U. S. 640, 648, 8 Sup. Ct. 1380, 32 L. Ed. 311, and cases there cited. It follows, of course, that, as a state cannot levy such a tax, a municipal corporation—a creature and agency of the state—cannot do so.

In Brown *v.* Maryland, 12 Wheat. 419, 444, 6 L. Ed. 678, in which a law of the state requiring an importer to take out a license and pay $50 before he should be permitted to sell a package of imported goods, was declared unconstitutional, CHIEF JUSTICE MARSHALL said: "But, if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but upon the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidding thing. All must see that a tax on the sale of an article which is imported only for sale is a tax on the article itself. * * * So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of an article, and

be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made."

In Welton *v.* Missouri, 91 U. S. 275, 278, 23 L. Ed. 347, the same principal was announced. It was there said by MR. JUSTICE FIELD: "Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in congress by the constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

Again in Leloup *v.* Port of Mobile, 127 U. S. 640, 645, 8 Sup. Ct. 1382, 32 L. Ed. 313, MR. JUSTICE BRADLEY said: "Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

The principle above declared, that a state has no power to tax the agencies or instruments utilized in negotiating sales of property when it could not tax the property itself, has been broadly stated and uniformly adhered to in all the cases. It is as applicable to brokers as any other agency engaged in interstate commerce. It has been applied by the supreme court in many cases that have come before it. We cannot do more than refer to a few of the leading and most pertinent ones.

In Robbins *v.* Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, it was decided that a statute of the state of Tennessee imposing a license tax on all drummers and persons offering for sale or selling goods, wares, or mer-

chandise by sample was invalid with respect to drummers for firms or individuals doing business in other states, upon the ground that such a tax was a regulation of interstate commerce. It was conceded in the opinion, as had been held in Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257, that when goods, prior to their sale, have been sent from one state into another state to be sold, and the latter state has become the situs of the property, or, in consequence of their sale, have been brought into the latter state, and become a part of its general mass of property within the state, they are liable to be taxed by it in the same manner as other property of a similar character; but that to tax the sale of such goods, or the offer to sell them, before they are bought into the state, was a very different thing, and clearly a tax on interstate commerce itself.

In that case the line was clearly drawn between the taxation of goods which have been sent into a state for sale, after their arrival in the state, and it has become their situs, and their taxation or the taxation of the agency or instrumentality utilized in their sale and introduction into the state; their sale after their arrival in the state being domestic commerce, and their taxation legitimate, while their sale prior to their introduction into the state is interstate commerce, and their taxation or the taxation of the instrument or means of their introduction is unlawful, because such taxation is a direct burden upon commerce between the states, which, under the constitution, cannot be imposed by the state without the assent of congress; and the silence of congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it shall be absolutely free. Brennan v. City of Titusville, 153 U. S. 289, 303, 14 Sup. Ct. 829, 38 L. Ed. 719; Robbins v. Taxing Dist., 120 U. S. 489, 493, 7 Sup. Ct. 592, 30 L. Ed. 694; and Stoutenburgh v. Hennick, 129 U. S. 141, 148, 9 Sup. Ct. 256, 32 L. Ed. 637. This distinction has not been departed from or qualified by any subsequent decision.

In Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed.

368, and in Stoutenburgh *v.* Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 937, the principle laid down in Robbins *v.* Taxing Dist., *supra*, was again carefully considered, and affirmed.

In McCall *v.* California, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 392, an agent in the city and county of San Francisco, Cal., for the New York, Lake Erie & Western Railroad Company, a corporation having its principal place of business in the city of Chicago, and operating a continuous line of road between Chicago and New York, was convicted and fined for not taking out the license and paying the tax on a railroad agency, as required by an order of the board of supervisors of the said city and county. His duties as such agent consisted in soliciting passenger traffic in that city and county over the said railroad. His employment was confined exclusively to inducing persons in the state of California to travel from that state over the line of the road he represented to the city of New York. It was held that his business was an agency of interstate commerce, and that the order under which he was prosecuted was obnoxious to the commerce clause of the constitution, and therefore invalid. "The object and effect of his soliciting agency," said MR. JUSTICE LAMAR in delivering the opinion of the court, "were to swell the volume of the business of the road. It was one of the 'means' by which the company sought to increase, and doubtless did increase, its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

In Ficklen *v.* Taxing Dist., 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601, the court held that the plaintiffs in error, having taken out licenses as general merchandise brokers under the law imposing the tax, whereby they were authorized to do any and all kinds of commission business, they were

legally liable to pay the privilege tax in question, although their principals happened during the previous year, as to the one party, to be wholly nonresident, and, as to the other, largely such, as this fact might have been otherwise then and afterwards, as their business was not confined to transactions for nonresidents. "The tax," said MR. CHIEF JUSTICE FULLER, "was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a general business." Distinguishing this case from that of Robbins *v.* Taxing Dist., he said: "In the Case of Robbins, the tax was held, in effect, not to be a tax on Robbins, but on his principals; while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom."

And again: "No doubt can be entertained of the right of a state legislature to tax trades, professions, and occupations, in the absence of inhibition in the state constitution in that regard; and, where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and nonresident merchants of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the constitution."

In concluding the opinion in that case it was said: "What position they [the complainants] would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for nonresident principals, is an entirely different question which does not arise upon this record." The particular question thus left open in that case is that which is directly presented in the case at bar.

The decision in the above case was thought by some to be a departure from the principles laid down in the other cases

we have referred to, but in Brennan *v.* City of Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719, MR. JUSTICE BREWER, in delivering the opinion of the court in that case, said: "The case of Ficklen *v.* Taxing Dist., 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601, is no departure from the rule of decision so firmly established by the prior cases. At least no departure was intended, though, as shown by the division in the court, and by the dissenting opinion of MR. JUSTICE HARLAN, the case was near the boundary line of the state's power. In that case the plaintiffs were in a general commission business, not acting for any particular firm within or without the state. Of the power of a state to impose a license tax upon such a general business there can be no question."

In the case of Brennan *v.* City of Titusville, just referred to, the plaintiff in error was convicted of the violation of an ordinance of the city of Titusville, in the state of Pennsylvania, which required all persons canvassing or soliciting orders for goods, books, paintings, etc., to pay a license tax. As agent for his principal, who was a manufacturer of frames and maker of portraits in the city of Chicago, in the state of Illinois, Brennan solicited orders for pictures and picture frames in the city of Titusville, in the state of Pennsylvania, without procuring a license and paying the tax required by the ordinance. It was held, upon a review of the cases to which we have referred, and of others in accordance with the principles established by them, that the license tax imposed on the plaintiff in error was a direct burden on interstate commerce, and was, therefore, beyond the power of the state, and void.

The case of Hopkins *v.* U. S., 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, was much relied upon as authority for the validity of the tax assessed against the defendant in the case before us. The relief sought in that case was based on an act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209), and the bill was filed against certain residents of the state of Kansas, who were members of a voluntary unincor-

porated association known and designated as the Kansas City Live-Stock Exchange. It was alleged that the members of the exchange had adopted for their government certain articles of association, rules, and by-laws, which were in restrain of trade and commerce between the states. It was held otherwise; but it will be seen running all through the opinion of the court that stress was laid upon the fact that the business of the members was wholly concerned with buying and selling live stock after their arrival at Kansas City, and that the distinction made in the cases heretofore cited between the sale or offer to sell in one state property which is situated in another state, and the sale of property after it has been brought into the state in which the sale is negotiated, was kept steadily in view,—the one being interstate commerce, and subject only to the regulation of congress, and the other being domestic, and subject to legislation by the state. Said MR. JUSTICE PECKHAM, in delivering the unanimous opinion of the court: "The selling of an article at its destination, which has been sent from another state, while it may be regarded as an interstate sale, and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such services is not, therefore, a combination in restraint of that trade or commerce."

It appeared that the members of the exchange sent solicitors into other states to induce the consignment of stock to them for sale. In reply to the argument that these solicitors were engaged in interstate commerce, the court said: "The position of the solicitors is entirely different from that of drummers who are traveling through the several states for the purpose of getting orders for the purchase of property. It was said in Robbins *v.* Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, that the negotiation of sales of goods which are in another state for the purpose of introduc-

ing them into the state in which the negotiation is made is interstate commerce."

"But the solicitors for these defendants have no property or goods for sale, and their only duty is to ask or induce those who own property to agree, when they send it to market for sale, they will consign it to the solicitor's principal, so that he may perform such services as may be necessary to sell the stock for them, and account to them for the proceeds thereof. Unlike the drummer who contracts in one state for the sale of goods which are in another, and which are to be thereafter delivered in the state in which the contract is made, the solicitor in this case has no goods or samples of goods, and negotiates no sales, and merely seeks to exact a promise from the owner of property that when he does wish to sell he will consign to and sell the property through the solicitor's principal. There is no interstate commerce in that business."

The plaintiff in error in the case at bar did not take out license as a general merchandise broker, or in fact any license, because he did not consider that the business he was pursuing was subject to state or municipal taxation; nor was he engaged in a general commission business, but confined his business to selling or offering to sell by sample and personal application, for non-resident principals exclusively, goods belonging to them in another state, for the purpose of introducing them into the state in which the sale is negotiated. His business related wholly to interstate commerce. Upon the reasoning of the cases which have been cited, and in accordance with the principles enunciated in them, it must be held that the license tax imposed by the city upon the plaintiff in error for the privilege of pursuing his said business was a direct burden upon interstate commerce, and was, therefore, beyond the power of the city. The ordinance under which the tax was assessed was not in any manner the exercise of the police power reserved to the states, which, it is well settled, may be exercised by them (Norfolk & W. R. Co. v. Com., 93 Va. 749,

Licenses—Brokers—Interstate Commerce.

24 S. E. 837, 34 L. R. A. 105, and the numerous cases therein cited and reviewed), but an ordinance adopted simply and wholly for the purpose of raising revenue.

The judgment of the hustings court must be reversed, the verdict of the jury set aside, and a new trial awarded the plaintiff in error.

BROWNBACK

v.

BURGESS, ETC., OF BOROUGH OF NORTH WALES.

(*Supreme Court of Pennsylvania, Feb. 12, 1900.*)

Ordinances to Prevent Sales on Streets—Police Power.*—A municipal ordinance providing for the licensing of all persons selling or offering to sell on the streets, or soliciting orders from house to house, if it makes no discrimination on any ground, but bears upon all persons impartially, is a valid exercise of the police power of a municipal corporation.

Same—Same—Soliciting Orders for Firm Paying License Tax in Another City.—Under such an ordinance, the license tax may be imposed upon a person soliciting orders for a mercantile house located and doing business in, and paying a license to, another city.

APPEAL by defendant from superior court. *Affirmed.*

The opinion of the superior court reads as follows:

"A prohibition of unlicensed peddling, which operates impartially, and without distinction between classes or residents of different civil subdivisions or of different states, is held to be a proper exercise of the police power of the state. Com. *v.* Brinton, 132 Pa. St. 69, 18 Atl. 1092; Com. *v.* Gardner, 133 Pa. St. 284, 19 Atl. 550, 7 L. R. A. 666; Com. *v.* Harmel, 166 Pa. St. 89, 30 Atl. 1036. But a prohibition which arbitrarily excepts certain classes or residents of certain localities from its operation is held invalid, as a denial of the equal rights of others. Com. *v.*

*See *notes*, 2 Mun. Corp. Cas. 723 *et seq.*

Snyder, 182 Pa. St. 630, 38 Atl. 356. The exercise of the police power directly by the legislature and by municipalities under legislative authority stands on the same ground, and is subject to the same conditions. 'If a statute or municipal ordinance is in reality directed only against certain persons who are engaged in a given business, or against certain communities, in such a manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such statute or ordinance is not a police, but a trade, regulation; and it has no right to shelter itself behind the police power of the state.' Sayre Borough *v.* Phillips, 148 Pa. St. 482, 24 Atl. 76, 16 L. R. A. 49. But if the prohibition is directed against the business, by whomsoever undertaken; does not prohibit, but regulates; is reasonable in scope, general in application, and impartial in operation,—it meets all the tests of its validity recognized by our supreme court. Com. *v.* Harmel, 166 Pa. St. 89, 30 Atl. 1036, 27 L. R. A. 388. As subjects for regulation under the police power, there is no substantial difference between the sale of commodities, with their attendant delivery, from house to house, and the solicitation of orders to be filled by future delivery. The essentials to the validity of a statute or ordinance for their regulation are the same.

"In Borough of Warren *v.* Geer, 117 Pa. St. 207, 11 Atl. 415, it was held that a borough incorporated under the general borough laws had power to pass an ordinance requiring persons selling or soliciting orders from house to house to be licensed. In Titusville *v.* Brennan, 143 Pa. St. 642, 22 Atl. 893, 14 L. R. A. 100, an ordinance forbidding unlicensed sales or solicitation of orders, except sales by sample to manufacturers or licensed dealers of the city, was sustained. While the supreme court of the United States held this ordinance invalid so far as it affected interstate commerce, the supreme court of our state has said: 'We do not understand that the decision of the supreme court of the United States is binding upon our court, so far as the Titusville ordinance concerns the citizens of this commonwealth. The ordinance,

by reason of the reversal, is inoperative only so far as it affects one soliciting orders for a business house in another state.' In Sayre Borough *v.* Phillips, 148 Pa. St. 482, 24 Atl. 76, 16 L. R. A. 49, an ordinance forbidding unlicensed sales or solicitation of orders, except by residents of the borough, was held invalid by reason of the exception; this being pronounced an attempt to regulate trade in the interest of residents, under pretense of police contol. In Shamokin *v.* Borough of Flannigan, 156 Pa. St. 43, 26 Atl. 780, a like ordinance, with an exception substantially similar, was for the same reason held invalid. In considering the principle that governs prohibitions of this kind, the supreme court of our state, in Sayre Borough *v.* Phillips, *supra*, said: 'The ordinance professes to prohibit all persons from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a borough license; and it fixes the price of a license at a figure that makes it, as it evidently was intended to make the ordinance, amount to prohibition. So long, however, as it bears upon all persons impartially, it may fairly claim to be a police regulation intended to destroy a business that was regarded as injurious; but at the end of the prohibiting section of the ordinance a proviso may be found which exempts all residents of the borough of Sayre from its operation. This proviso converts the police regulation into a trade regulation. The ordinance, taken as a whole, does not prohibit an injurious business, but an injurious competition. That the resident dealer or peddler may enjoy a larger trade, the nonresident peddler is shut out.'

"In the case before us the ordinance provides for the licensing of all person selling or offering to sell on the streets, or soliciting orders from house to house. It makes no discrimination on any ground, but bears upon all persons impartially. In brief, it conforms to all the requirements which in the cases cited have been held essential to the validity of such a provision as a police regulation. As was said in Com.

Ordinance to Prevent Sales on Streets—Police Power.

v. Harmel, *supra*, of the act of February 6, 1830 (P. L. p. 39), prohibiting the peddling of clocks without license: 'It is directed against all persons. It does not distinguish between the citizens of different civil subdivisions of this state, or between citizens of Pennsylvania and those of any other state. It is directed against the business, by whomever undertaken. It does not prohibit the business, but regulates it. The regulation is reasonable. It is impartial in its operation. It is general in its application. It meets the tests required by Millerstown Borough *v.* Bell, 123 Pa. St. 151, 16 Atl. 612, by Sayre Borough *v.* Phillips, 148 Pa. St. 482, 24 Atl. 76, 16 L. R. A. 49, and by Welton *v.* Missouri, 91 U. S. 275, 23 L. Ed. 347.'

"The argument that the ordinance does not operate uniformly as to all persons, since it discriminates against citizens of Pennsylvania, while inoperative as to nonresidents of the state, and should therefore be pronounced invalid, cannot prevail. It must be remembered that 'the jurisdiction of a state is co-extensive with its territory,—co-extensive with its legislative powers.' Its laws and judicial decrees are paramount over persons and property within this jurisdiction. But they have no extraterritorial force, and the legal presumption is that they were intended to operate within the limits of the state. *In re* Schoenhofen Brewing Co.'s Wholesale Liquor License, 8 Pa. Super. Ct. 141. It follows, therefore, that, in regulating the public business and the affairs of the citizens of this state, the ordinance in question is strictly within the constitutional limitations applicable thereto, and within the powers of our state legislature. If it is injurious to the interests of our own citizens, the remedy for its correction rests with the legislature or the borough council.

"It is not material here that the Philadelphia house from which the purchases were made paid a mercantile license tax in that city. This gave them no greater

Same—Same—Soliciting Orders for Firm Paying License Tax in Another City.

right under the ordinance than that enjoyed by licensed merchants of the borough. Moreover, while the salesman is described as an agent, it is quite apparent that the nominal principal dealt wholly with him, and not at all with the several purchasers; that practically he was a middleman, buying of the Philadelphia house, and selling to his customers on orders previously obtained. But he and his principal are subject, in common with all others, to the regulation of the business provided for by the ordinance. The objection that this provides for no control or supervision of the business applies with equal force to the prohibitions which have heretofore been held valid, and cannot well be raised in this instance. The judgment of the common pleas is reversed, and the judgment of the justice is reinstated; all costs to be paid by the defendant."

M. M. Gibson, *G. R. Fox*, and *N. H. Larzelere*, for appellant.

Montgomery Evans, *James B. Holland*, and *John M. Dettra*, for appellee.

PER CURIAM. We concur with the superior court in the disposition of this case. The reasons for the decision of the court are so well and so convincingly expressed in the opinion that we feel we could add nothing to them, and we therefore affirm the judgment of the superior court on the opinion filed. The judgment of the superior court is affirmed.

GUNDLING

v.

CITY OF CHICAGO.

(*Supreme Court of the United States, April 9, 1900.*)

Licenses—Sale of Cigarettes—Validity of Ordinance—Federal Constitution.—An ordinance forbidding the sale of cigarettes within the city without a license; but providing that the license shall be issued in every case where the mayor is satisfied that the applicant is of good character and reputation and a suitable person to be intrusted with the sale of cigarettes, provided such applicant will file a bond in the sum of $500, as security that he will faithfully observe and obey the laws of the state and the ordinances of the city with reference to cigarettes, does not violate any provision of the federal constitution.

Power of State to Regulate Occupations.—What shall be the regulations respecting the pursuit of a lawful trade or business, and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and unless such regulations are so utterly unreasonable in their nature and purpose that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed, without due process of law, they do not extend beyond the power of the state to pass, and form no subject for federal interference.

Federal Questions.—Whether or not such ordinance contains a delegation of power by the common council to the mayor is not a federal question, in a case in the supreme court of the United States to review a decision of the state court.

License Fees—Municipal Power—Federal Constitution.—A city under state authority, may require a license fee for the privilege of carrying on a business within its limits of such an amount as to be both a means of regulating the business and a tax in the nature of an exercise imposed upon the privilege of carrying on the business, without violating any provision of the federal constitution.

ERROR by defendant to the state of Illinois supreme court. *Affirmed.*

Gundling *v.* City of Chicago

Messrs. Lee D. Mathias and *Charles H. Aldrich* for plaintiff in error.

Messrs. Frederic D. McKenney, Charles M. Walker, and *Henry Schofield* for defendant in error.

MR. JUSTICE PECKHAM delivered the opinion of the court:

The plaintiff in error was convicted in a police court of the city of Chicago of a violation of an ordinance of that city forbidding the sale of cigarettes by any person without a license, and was fined $50. From the judgment of conviction he appealed to the criminal court of Cook county, where it was affirmed, and thence to the supreme court of the state, where it was again affirmed, and he now brings the case here on writ of error.

Case Stated.

Sections 1, 2, and 8 of the ordinance referred to read as follows:

"Sec. 1. The mayor of the city of Chicago shall from time to time grant licenses authorizing the sale of cigarettes within the city of Chicago, in the manner following, and not otherwise.

"Any person, firm, or corporation desiring a license to sell cigarettes shall make written application for that purpose to the commissioner of health, in which shall be described the location at which such sales are proposed to be made. Said application shall be accompanied by evidence that the applicant, if a single individual, all the members of the firm, if a copartnership, and person or persons in charge of the business, if a corporation, is or are persons of good character and reputation. The commissioner of health shall thereupon submit to the mayor the said application with the evidence aforesaid, with his opinion as to the propriety of granting such license, and if the mayor shall be satisfied that the persons before mentioned are of good character and reputation, and are suitable persons to be intrusted with the sale of cigarettes, he shall issue a license in accordance with such application, upon such applicant filing a bond payable to the city of Chicago, with at least two sureties,

to be approved by the mayor, in the sum of $500, conditioned that the licensed person, firm, or corporation shall faithfully observe and obey all laws of the state of Illinois and ordinances of the city of Chicago now in force or which may hereafter be passed, with reference to cigarettes; provided, however, that nothing herein contained shall be held to authorize the sale of cigarettes containing opium, morphine, jimson weed, belladonna, glycerine, or sugar.

"Sec. 2. Every person, on compliance with the aforesaid requirements and the payment in advance to the city collector, at the rate of $100 per annum, shall receive a license under the corporate seal, signed by the mayor and countersigned by the clerk, which shall authorize the person, firm, or corporation therein named to expose for sale, sell, or offer for sale cigarettes at the place designated in the license; provided, that no license shall be granted to sell within 200 feet of a schoolhouse.

"Sec. 8. Any person who shall hereafter have or keep for sale or expose for sale or offer to sell any cigarettes at any place within the city of Chicago, without having first procured the license provided, shall be fined not less than $50 and not exceeding $200 for every violation of this ordinance, and a further penalty of $25 for each and every day the person, firm, or corporation persists in such violation after a conviction for the first offense."

The other sections are not material to this inquiry.

The plaintiff in error made no application to the health commissioner to obtain a license from the mayor in accordance with the above-mentioned ordinance. He specially set up in the courts below that the ordinance was invalid, because in violation of the Fourteenth Amendment, as depriving him of his property without due process of law. He contended in the state courts that the common council of the city of Chicago had no right to pass the ordinance in question, because no such power was given to it under the general act of the state of Illinois which incorporated the city of Chicago. The supreme court of the state, however,

in construing that act, decided that it did authorize the city to pass the ordinance, and the plaintiff in error admits that this decision is conclusive upon us as the decision of a question of local law by the highest court of the state.

He makes two claims here upon which he bases the statement that the ordinance violates his rights under the Fourteenth Amendment of the Federal Constitution. Quoting from counsel's brief, these claims are: "First, that the state itself, acting through the common council of the city of Chicago, is inhibited by the Federal Constitution from making those provisions in the ordinance which delegate to the mayor the entire subject of granting and revoking licenses to persons engaged in the business of selling cigarettes; second, that the ordinance is unconstitutional and void as being an unreasonable exercise of the police power by imposing a license fee of $100, a sum manifestly greater than the expense of issuing the license and providing for the regulation, thereby depriving persons of their liberty and property by an interference with their rights which is neither necessary to the protection of others nor the public health."

He contends that the ordinance vests arbitrary power in the mayor to grant or refuse a license to sell cigarettes, and that such arbitraty power is a violation of the amendment in question.

He claims also that he has been denied the equal protection of the laws, because in other kinds of business, where licenses are granted to persons engaged in any trade or occupation, no member thereof is "singled out and subjected to the absolute supervision of an irresponsible magistrate while his neighbor is protected in his right by the customary safeguards of the law."

It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. He made no application for a license, and of course the mayor has not refused it. *Non constat*,

that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused a license.

But, assuming that the question may be raised by him, we think the ordinance in question does not violate the Fourteenth Amendment, either in regard to the clause requiring due process of law, or in that providing for the equal protection of the laws.

The case principally relied upon by the plaintiff in error is that of Yick Wo *v.* Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064, relating to the regulation of laundries in the city of San Francisco. The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because, with reference to the subject upon which it touched, it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on a laundry, with reference to the competency of the persons applying or the propriety of the place selected. It was also held that there was a clear and intentional discrimination made against the Chinese in the operation of the ordinance, which discrimination was founded upon the difference of race, and was wholly arbitrary and unjust. It appeared that both petitioners, who were engaged in the laundry business, were Chinese, and had complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire or as a protection against injury to the public health, and yet the supervisors, for no reason other than discrimination against the Chinese, refused to grant the licenses to the petitioners and to some 200 other Chinese subjects, while granting them to eighty people who were not such subjects and were working under precisely the same

conditions. Such an ordinance, so executed, was held void by this court. Speaking in that case of the general right to grant licenses in regard to occupations or trades, MR. JUSTICE MATTHEWS, in delivering the opinion of the court, said:

"The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

The ordinance in question here does not grant to the mayor arbitrary power such as is described in the above-mentioned laundry case, but the provision is similar to that mentioned in the foregoing extract from the opinion in that case. In the case at bar, the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be intrusted with the sale of cigarettes, provided such applicant will file a bond as stated in the ordinance, as a security that he will faithfully observe and obey the laws of the state and the ordinances of the city with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature by him. There is no proof nor charge in the record that there has been any discrimination against individuals applying for a license or any abuse of discretion on the part of the mayor. Whether dealing in and selling cigarettes is that kind of a business which ought to be licensed is, we think, considering the character of the article to be sold, a question for the state, and through it, for the city, to determine for itself, and that an ordinance providing reasonable conditions upon the performance of which a license may be granted to

Licenses—Sale of Cigarettes—Validity of Ordinance—Federal Constitution.

sell such article does not violate any provision of the Federal Constitution.

Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference.

Power of State to Regulate Occupations.

As stated in Crowley *v.* Christensen, 137 U. S. 86, 34 L. Ed. 620, 11 Sup. Ct. Rep. 13, "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community."

Whether there is or is not a delegation of power by the common council to the mayor is not in this case a Federal question.

Federal Question.

We have no doubt that the ordinance, so far as the obectijon above considered is concerned, was clearly within the power of the state to authorize, and must be obeyed accordingly.

The other objection made to the validity of the ordinance is that the amount of the license fee ($100) is an improper and illegal interference with the rights of the citizen, and is therefore a violation of the Fourteenth Amendment.

License Fee—Municipal Powers—Federal Constitution.

The amount of the fee is fixed by the common council for the privilege of doing business, and the text of the ordinance and the amount of the fee therein named

would seem to indicate that it is both a means adopted for the easier regulation of the business and a tax in the nature of an excise imposed upon the privilege of doing it. In either case the state has power to make the exaction, and its exercise by the city under state authority violates no provision of the Federal Constitution.

The supreme court of Illinois has held that the city was authorized by the state law to impose the license fee.

In speaking of a license to do business, it was said in Royall *v.* Virginia, 116 U. S. 572, 579, 29 L. Ed. 735, 737, 6 Sup. Ct. Rep. 510, 513: "The payment required as a preliminary to the license is in the nature and form of a tax, and is a due to the state which it may demand and exact from every one of its citizens who either will or must follow some business avocation within its limits, to the pursuit of which the assessment is made a condition precedent. It is an occupation tax, for which the license is merely a receipt, and not an authority except in that sense, because it is laid and collected as revenue, and not merely as incident to the general police power of the state, which, under certain circumstances and conditions, regulates certain employments with a view to the public health, comfort, and convenience."

It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate where a license is imposed for following the same, while the revenue obtained onaccount of the license is none the less legal because the ordinance which authorized it fulfils the two functions, one a regulating and the other a revenue function. So long as the state law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution.

There is no error in the record, and *the judgment of the Supreme Court of Illinois is affirmed.*

NEGLEY

v.

CITY OF HENDERSON.

(*Court of Appeals of Kentucky, Feb. 24, 1900.*)

Taxation—Exemption of Municipal Property.*—Gasworks and waterworks property owned by a city and a lot owned by it and used for storage purposes are not exempt from state and county taxes under sect. 170, Ky. Const.

Same—Same.—In order to bring a lot owned by a city and used for cemetery purposes within the provision of Ky. Const., section 170, exempting from taxation places of burial "not held for private or corporate profit," it must be averred that such lot is not held for profit.

APPEAL by defendant from Henderson county circuit court. *Reversed.*

Montgomery Merritt, for appellant.
Clay & Clay, for appellee.

PAYNTER, J. The appellant, Negley, is sheriff of Henderson county, and has in his hands for collection for state and county purposes tax receipts against the appellee, city of Henderson, on account of the assessment of its waterworks property, its gasworks property, and two certain lots in that city. The object of this action was to have the sheriff perpetually enjoined from collecting the tax, on the ground that the property is exempt from taxation. The city owns the waterworks property. It is not exempt from taxation under section 170 of the constitution. City of Covington *v.* Com., 39 S. W. 836. That case was appealed to the supreme court of the United States, and there affirmed. It is unnecessary to repeat the reasons given in that case for holding that waterworks property, belonging to a city, is not exempt

Case Stated.

Taxation—Exemption of Municipal Property.

*See City of Newport *v.* Commonwealth (Ky.), 2 Mun. Corp. Cas. 148, and *note*, 159.

from taxation. The gasworks property is not exempt from taxation for the reasons given in the case *supra*.

It is claimed that the lot on the corner of Fourth and Elm streets is used as a cemetery. Section 170 of the constitution exempts from taxation places of "burial not held for private or corporate profit." The averments of the petition do not show that the lot in question is exempt from taxation, because of the absence of an averment that it was not held for profit.

Same—Same.

We are of the opinion that the other lot assessed, which is used by the city as a place of storage for tools, is not exempt from taxation. There are no facts averred with reference to it which show it is exempt from taxation. The judgment is reversed for proceedings consistent with this opinion.

DUNCAN

v.

CITY OF LYNCHBURG.

(*Supreme Court of Appeals of Virginia, Feb. 8, 1900.*)

Municipal Corporations—Powers—Ownership of Property Outside of City Limits.*—Authority given a city by its charter to purchase, hold, sell, and convey all real and personal property necessary for its uses and purposes must be exercised within, and not without, the limits of the city.

Same—Same—Owning Rock Quarry.—The ownership and operation of a rock quarry by a municipal corporation is not indispensable to the accomplishment of the objects of the creation of such corporation.

Same—Charter Construed.—A section of the charter of a city authorized it, in connection with the county in which it was located, to pave and macadamize the highways of that county for the distance of two miles from the city, and expressly provided that the city should not be held liable for the improper exercise of the powers therein conferred. *Held*, that the city could not be held liable under such

*See note at end of case.

Duncan *v.* City of Lynchburg

section for a nuisance caused by a rock quarry owned by it without the city limits.

Same—Nuisances—Pleading and Practice.—In an action to recover for injuries caused by a nuisance created by the officers of a city, demurrer is the proper and usual method of raising the question whether the work which gave rise to the nuisance was within the city's powers.

ERROR by plaintiff to corporation court of Lynchburg. *Affirmed.*

A. S. Hester, for plaintiff in error.

N. C. Manson, for defendant in error.

BUCHANAN, J. This is an action on the case against the city of Lynchburg for creating and continuing a nuisance near the premises of the plaintiff, to the damage of the health and comfort of himself and family. Case Stated.

It is averred in the declaration that the defendant, while operating a rock quarry outside of the limits of the city, erected a privy for the use of its employees, including its chain gang, over a stream of water which runs under the front porch of the dwelling house occupied by the plaintiff, situated near by, and just below the quarry, and so polluted the stream as to render his premises unfit for habitation, and to cause serious sickness in his family.

The defendant demurred to the declaration upon the ground that the injury complained of was not caused by an act done within the scope of the power and authority of the city, but was the result of an *ultra vires* act, for which the city was not liable.

The trial court sustained the demurrer and gave judgment for the defendant. To that judgment this writ of error was awarded.

The question presented for our determination is whether the nuisance complained of was created or continued by the agents or employees of the defendant city while engaged in a work which was within its corporate powers.

In order to render a municipal corporation liable in dam-

ages for the torts of its agents and employees, it is necessary, among other things, that the injury complained of be caused by, or result from, an act done in the exercise of some power conferred upon it by its charter or other positive enactment.

"If the act complained of," says JUDGE DILLON, "necessarily lies wholly outside of the general or special powers of the corporation, as conferred in its charter or statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act, or whether it be done by its officers without its express command. * * * But, if the wrongful act be not in this sense *ultra vires*, it may be the foundation of an action of tort against the corporation, either when it was done by its officers under its previous direct authority, or has been ratified or adopted expressly or impliedly by it, or when it was done by the officers, agents, or servants of the corporation in the execution of corporate powers or the performance of corporate duties of a municipal nature, and was done so negligently or unskillfully as to injure others, in which case the corporation is liable for the carelessness or want of skill of its officers or immediate servants or agents in the course of their authorized employment, without express adoption or ratifying act." 2 Dill. Mun. Corp. (4th Ed.) § 968; Smith *v.* City of Rochester, 76 N. Y. 506; Cavanagh *v.* City of Boston, 139 Mass. 426, 1 N. E. 417; Horn *v.* Mayor, etc., 30 Md. 218.

It is the settled law of this state that a municipal corporation possesses and can exercise the following powers, and none others; First, those granted in express words; second, those necessarily or fairly implied, or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. City of Winchester *v.* Redmond, 93 Va. 711, 714, 25 S. E. 1001; Railway Co. *v.* Dameron, 95 Va. 545, 548, 28 S. E. 951; 1 Dill. Mun. Corp. § 89.

By section 7, c. 6, of the charter of the city (Acts Assem. 1895–96, p. 201), it is provided that the council shall, in addition to the general powers vested in it by the laws of the

state, have power "to purchase, hold, sell, and convey all real and personal property necessary for its uses and purposes" (subsection 3); "to erect in or near the city suitable workhouses, houses of correction or reformation and houses for the reception and maintenance of the poor and destitute" (subsection 5); "to establish and regulate public squares and parks in or near the city," and to acquire, by purchase, condemnation, or otherwise, the land deemed necessary for such uses (subsection 6); "to establish waterworks or gasworks within or without said city"; to acquire land for such purposes by purchase or condemnation; and to protect from injury or pollution by proper penalties said works or anything connected therewith within or without the city, "and under this authority to prevent the pollution of the water in the river by prohibiting the throwing of filth or offensive matter therein for a distance of six miles above the limits of the city" (subsection 7); "to establish or acquire by purchase and to operate within or without the corporate limits suitable works for the generation of electricity for illuminating or other purposes, and to acquire lands for such use by purchase or condemnation" (subsection 8); "to provide in or near the city lands to be used as burial places for the dead and to improve and care for the same and the approaches thereto" (subsection 17); and, concurrently with the board of supervisors of Campbell county, "to take care, supervision and control for a distance of two miles from the city limits, of all public roads extending from the city into Campbell county, and jointly with said supervisors to close, extend, widen, narrow, lay out, graduate, pave, macadamize and otherwise improve and alter said roads for such distance and to keep the same in good order and repair and to condemn the necessary land for the purpose. * * * Nothing contained herein shall be construed as compelling the exercise of the powers herein given or as fixing any liability on the said city for the failure to exercise or the improper exercise of the said powers, except damages for the land condemned, which are to be ascertained

and fixed in the manner provided by the general laws of the state." Subsection 39.

Power is given to city councils, under the general law, to provide in or near the city waterworks, cemeteries, hospitals, and pest houses. Code, §§ 1038, 1719, 1721.

None of the provisions of the charter nor of the General Statutes above quoted expressly confer upon the city the right to acquire and operate a rock quarry. If such power can be necessarily or fairly implied from the powers expressly granted, it must be under subsections 3 and 39 of section 7, c. 6, of the charter. The power given by subsection 3, which authorizes the city to purchase, hold, sell, and convey all real and personal property necessary for its uses and purposes, must, I apprehend, be exercised within, and not without, the limits of the city; for the general rule is that the power of a municipal corporation is confined to its own territorial limits, and, without some special provision authorizing it, it cannot possess any control or rights in or over lands lying without those limits. Denton *v.* Jackson, 2 Johns. Ch. 320, 336; Riley *v.* City of Rochester, 9 N. Y. 64; City of Coldwater *v.* Tucker, 36 Mich. 475, 477; 2 Dill. Mun. Corp. § 565.

Municipal Corporations—Powers—Ownership of Property Outside of City Limits.

"Municipal corporations," says JUDGE DILLON in the section cited, "being created chiefly as governmental agencies, and for the attainment of local objects merely, the general rule is that they cannot purchase and hold real estate beyond their territorial limits unless the power is conferred by the legislature. It has been expressly decided that a conveyance to a municipal corporation of lands beyond its boundaries for the purpose of a street is void, though the corporation has by its charter power 'to purchase, hold, and convey any real property for the public use of the corporation.' The author, however, is inclined to think that there are purposes for which such corporation may without special grant purchase and hold extraterritorial lands, as for a pest

house, cemetery, and the like objects of a municipal character "

If it be true, as the learned author is inclined to think, that a municipal corporation without special authority may purchase and hold lands without its limits for some purposes, it must be because the lands are indispensably necessary to enable it to protect the health and well-being of its people.

Same—Same—Owning Rock Quarry.

It might be convenient for a municipal corporation to own and operate a rock quarry, but it is manifestly not indispensable that it should do so, in order that it may accomplish the objects of its creation.

Again, the provisions of the charter conferring special power upon the city to acquire lands without the city for workhouses, houses of correction or reformation or the reception of the poor, public squares or parks, waterworks and gasworks, electric plants, the burial of the dead, and highways in the county of Campbell, would seem to exclude the idea that it was the intention of the legislature, in granting the charter, to confer any other extraterritorial powers upon the city than those expressly named.

Same—Charter Construed.

If the power to acquire and operate a rock quarry can be necessarily or fairly implied from the provisions of subsection 39 (section 7, c. 6, of the charter), which authorizes the city, in connection with the county of Campbell, to pave and macadamize, among other things, the highways of that county for a distance of two miles from the city, it would not aid the plaintiff; for it is expressly provided in that section that nothing in it shall be construed as compelling the exercise of the powers conferred by it, or as fixing any liability on the city for the failure to exercise, or the improper exercise of, the powers conferred, except damages for lands condemned for public highways. The object of that provision was manifestly to protect the city from any other or further

Note

liability than the county of Campbell (its associate in establishing and maintaining the roads) would be under in exercising the powers conferred. And, as is well settled, the county being one of the political subdivisions of the state, it would not be liable in damages to the plaintiff if it or its agents or employees had caused the injury complained of. Fry *v.* Albemarle Co., 86 Va. 195, 9 S. E. 1004; Field *v.* Albemarle Co. (Va.), 20 S. E. 954; 2 Dill. Mun. Corp. §§ 23, 963, note 1; 1 Shear. & R. Neg. § 256.

The contention of the plaintiff in error that the question of whether or not the work in which the city officials were engaged when the nuisance complained of was created was within its powers could not be raised by demurrer, but only by a plea, is wholly untenable. The courts take judicial notice of the charters of municipal corporations. 1 Dill. Mun. Corp. § 83; 4 Minor Inst. 1210, 1211; Code, § 3328; 1 Greenl. Ev. § 4, note 3. And, if the cause of action stated in the declaration is one for which the corporation is not liable, a demurrer is the proper and usual way to raise the question. Sayre *v.* Turnpike Road, 10 Leigh 474; Noble *v.* City of Richmond, 31 Grat. 271; Orme *v.* City of Richmond, 79 Va. 86; Powell *v.* Town of Wytheville, 95 Va. 73, 27 S. E. 805; Maia's Adm'r *v.* Directors, 97 Va. —, 34 S. E. 617.

Same—Nuisances—Pleading and Practice.

It follows from what has been said that the defendant was not liable in damages for the injury complained of, that the demurrer was properly sustained by the trial court, and that the judgment must be affirmed.

NOTE.

Municipal Corporations—Owning Property beyond City Limits.—Without express authority a municipality cannot acquire lands beyond its territorial limits. Bullock *v.* Curry, 2 Met. (Ky.) 171; Girard *v.* Municipality of New Orleans, 2 La. An. 897; Chambers *v.* City of St. Louis, 29 Mo. 543; City of Concord *v.* Boscawen, 17 N. W. 465; Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 320–336; North Hemstead *v.* Hemstead

2 Wend. (N. Y.) 131, Hopk. 594; Straub *v.* Pittsburgh, 21 Pitts. L. J. N. S. 91.

Under a village charter which declares that the corporation shall be "capable of purchasing, holding and conveying any estate, real or personal, for the public use of said corporation," no authority is conferred to purchase lands beyond its boundaries for a highway. Riley *v.* City of Rochester, 9 N. Y. 64. In Somerville *v.* Waltham, 170 Mass. 160, 48 N. E. 1092, it was held that a purchase of land in another city or town made by a municipal corporation for municipal purposes. See also *Re* New York, 99 N. Y. 569; Newman *v.* Ashe, 9 Baxt. (Tenn.) 380.

WOOD *et al.*

v.

CITY OF HINTON.

(*Supreme Court of Appeals of West Virginia, March 31, 1900.*)

Abatement of Nuisances—Liability of Municipal Corporation.—A declaration filed against a municipal corporation in an action on the case, which avers that the common council authorized the plaintiff to erect a carpenter shop on a certain lot within such municipality, with the knowledge that a steam engine would be necessary in running the machinery connected with such shop, and that after the erection of such shop the council modified such permit so as to forbid the use of such steam engine therein, to the great damage and loss of the plaintiff, states no sufficient cause of action against such municipality.

Same—Same.*—The power of the common council of a city, town, or village to prevent or abate nuisances is governmental and discretionary, and for the proper exercise thereof the city cannot be held liable for the loss or destruction of property or damages occasioned thereby. Such loss, if any, must fall upon the actual or proposed nuisancer.

(Syllabus by the Court.)

ERROR by defendant to Summers county circuit court. *Reversed.*

Miller & Read, for plaintiffs in error.

Vinson & Thompson, for defendant in error.

*See notes at end of case.

Wood *v.* City of Hinton

DENT, J. D. C. Wood & Co., plaintiffs, sued the city of Hinton, defendant, in the circuit court of Summers county, and recovered a judgment for $——. Defendant obtained a writ of error. The whole question involved arises on the demurrer to the declaration, which is as follows: "State of West Virginia, County of Summers—ss.: In the Circuit Court Thereof. D. C. Wood and W. H. Griffith, partners in trade under the firm name and style of D. C. Wood & Co., complain of the city of Hinton, a municipal corporation duly organized and existing under the laws of the state of West Virginia, of a plea of trespass on the case, for that theretofore, to wit, on the —— day of ——, 1897, at the time of the damage and injury to the said plaintiffs as hereinafter mentioned, in the city of Hinton as aforesaid, the plaintiffs applied to the common council of the said city of Hinton, then and there assembled for the purpose of transacting business for the said city of Hinton, for permission to erect a carpenter shop on a certain lot in said city (said lot being on Third avenue, and known as the 'Saul Lot'); and the said common council, well knowing of what the said carpenter shop consisted, and how the same was to be operated, granted the plaintiffs the privilege to erect said carpenter shop upon the said lot, within the corporate limits of said city. The plaintiffs, acting in good faith and in accordance to the provisions in said permit, leased the lot mentioned as aforesaid for a period of five years, paying therefor a large sum of money, to wit, $300, and, still acting in accordance to said permit, the plaintiffs proceeded to tear down the building in which said carpenter shop was located, and to move said building and shop, and all tools and fixtures thereto belonging, a great distance, and at a great cost, to wit, $300, and the plaintiffs began to erect their shop, complying with the terms of the said permit granted by the said common council; and after they had gotten the said building well-nigh completion, and had expended a great deal of labor and a large sum of money, to wit, $500, in the purchase of material and the

Case Stated.

hire of labor for the construction of the said building on the lot aforesaid, to wit, the Saul lot, the said common council for the city of Hinton, without notice to the plaintiffs, convened a meeting, and at said meeting the said common council revoked or so changed the said permit as to prevent the said plaintiffs from putting in the machinery and appliances necessary to run said carpenter shop; and on the —— day of ——, 1897, the chief of police for the city aforesaid served a notice on the plaintiffs not to put in said shop any steam engine, thereby rendering the said shop entirely worthless to the plaintiffs; the said defendant well knowing at the time the permit aforesaid was granted that, in order to operate the machinery which was necessary to carry on their business aforesaid, it was necessary for them to employ a steam engine, in order to operate their machinery aforesaid. And by reason of the order revoking and changing said permit, and the notice served by the chief of police aforesaid, the machinery, tools, appliances, and steam engine were greatly damaged, impaired, and rendered worthless, by reason of the plaintiffs' inability to procure proper place to store the same, to the amount of $200. And by reason of the premises aforesaid, to wit, the revocation of the order or permit for the erection of the building aforesaid, plaintiffs were hindered, delayed, and prevented from carrying on their usual business and avocation for a long space of time, to wit, for the space of —— months, by reason of which they sustained great injury and loss, to wit, to the amount of $700, by reason of the allegations aforesaid and the premises aforesaid, all of which were well known to the defendant. Wherefore, by means of the premises, and of the wrong, grievances, and injuries hereinbefore mentioned, said plaintiffs have sustained damages to the amount of $2,000. Therefore they sue. Lively, Thompson & Lively, and J. S. Thompson, P. Q."

This declaration states no cause of action against the city of Hinton, whatever. The city of Hinton, as a branch of the

state government, cannot be held liable in a suit for damages for any act done by its officers in discharge of, or attempting to discharge, its governmental powers. Among these, as provided in the statute, is the power to prevent injury or annoyance to the public or individuals from anything dangerous, offensive, or unwholesome; to abate or cause to be abated anything which, in the opinion of the majority of the whole council, shall be a nuisance; to regulate the keeping of gunpower and other combustibles. None of these are what are called positive or administrative powers, but they are all purely governmental and discretionary. The refusal of the town authorities to permit the use of a steam engine in the building complained of is probably because of its being a nuisance, either from fire, smoke, or noise, or all combined. Whether it was so or not, that was a matter for the council to determine; and, it having so determined, its action is final, unless annulled by proper judicial proceedings. This right of the council seems to be conceded, but the complaint is that the council first gave permission, and then, after it had been acted upon by the plaintiffs at large expense, it revoked the authority to use a steam engine, and thereby cause the plaintiffs loss and damages. If the council is wrong in the course it pursued, the town is in no sense liable. Even after the works were fully erected and in operation the town would have had the right to abate them, if they proved to be a nuisance to the public or individuals. This belongs to its governmental and public powers. Every person engaged in a business that may become a nuisance must take notice of the law in this respect, although permitted to do so in the beginning by public authority. This is a risk assumed when such business is engaged in by such person. It is beyond the power of the town council to contract away the authority to prevent or abate nuisances, and, if they should do so, their acts are *ultra vires* null and void, and the town is not bound thereby, nor made liable to damages by reason of a breach of such void contract. Parkersburg Gas Co. *v.* City of Parkersburg,

Abatement of Nuisances—Liability of Municipal Corporation.

Notes

30 W. Va. 435, 4 S. E. 650; Spilman *v.* City of Parkersburg, 35 W. Va. 605, 14 S. E. 279. It is not averred in the declaration that the act complained of was wrongful or illegal, and, if not, the town could not, certainly, be liable for the lawful acts of any of its authorities. If either the granting the permit in the first instance, or revoking it in the second, was an unlawful assumption of authority, which is not averred in the declaration, the town could not be held liable for damages consequent thereon or arising therefrom. It has been repeatedly held that, "as to the powers and functions of an incorporated town of a public governmental character, it is not liable for damages caused by the wrongful acts of negligence of its officers or agents therein." Bartlett *v.* Town of Clarksburg, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295; Thomas *v.* Town of Grafton, 34 W. Va. 282, 12 S. E. 478; Brown's Adm'r *v.* Town of Guyandotte, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121; Mendel *v.* City of Wheeling, 28 W. Va. 233. If the act complained of was a lawful exercise of power, which appears to be admitted in the declaration, the town could not be held liable, although injurious to the individual. Such injuries always are the result of the prevention or abatement of nuisances, and yet they must be prevented or abated by the police power; and the nuisancer must bear the loss occasioned thereby, even to the expense of abatement. Baumgartner *v.* Hasty, 100 Ind. 575; Meeker *v.* Van Rensselaer, 15 Wend. 397. From this it is plain the plaintiff showed no cause of action against the defendant. The judgment is reversed, the demurrer to the declaration sustained, and the suit dismissed.

Same—Same.

NOTES.

Liability of Municipal Corporations for Failure to Abate Nuisances.—The principal case accords with an almost unanimous line of authorities in holding that a failure by a municipal corporation to exercise its power to abate nuisances not rendering its streets unsafe and not

Notes

created by its agents does not give a person who is injured by such failure a private action against the corporation.

United States.—Fowle *v.* Alexandria, 3 Pet. (U. S.) 398.

Alabama.—Campbell *v.* Montgomery, 53 Ala. 527; Davis *v.* Montgomery Council, 51 Ala. 139, 23 Am. Rep. 545.

Connecticut.—Hewison *v.* New Haven, 37 Conn. 475.

Georgia.—Forsyth *v.* Atlanta, 45 Ga. 152.

Illinois.—Goodrich *v.* Chicago, 20 Ill. 445.

Indiana.—Faulkner *v.* Aurora, 2 Am. & Eng. Corp. Cas. 520.

Iowa.—Ogg *v.* Lansing, 35 Iowa 495.

Kentucky.—James *v.* Harrodsburg (Ky.), 16 Am. & Eng. Corp. Cas. 482.

Louisiana.—Bennett *v.* New Orleans, 14 La. Ann. 120.

Massachusetts.—Hill *v.* Boston, 122 Mass. 344; Hafford *v.* New Bedford, 16 Gray (Mass.) 297.

Michigan.—Burford *v.* Grand Rapids, 53 Mich. 98.

Missouri.—Kansas City *v.* Kiley, 13 Am. & Eng. Corp. Cas. 446; Armstrong *v.* Brunswick, 79 Mo. 319, 8 Am. & Eng. Corp. Cas. 404.

New York.—Wilson *v.* Mayor, 1 Denio (N. Y.) 595; Cole *v.* Medina, 27 Barb. (N. Y.) 218; Levy *v.* Mayor of New York, 1 Sandf. (N. Y.) 464; Cain *v.* Syracuse, N. Y. Rep. 83, 5 Am. &. Eng. Corp. Cas. 371.

North Carolina.—Hill *v.* Charlotte, 72 N. Car. 55.

Pennsylvania.—Carr *v.* N. Liberties, 35 Pa. St. 324; Grant *v.* Erie, 69 Pa. St. 420; Fair *v.* Philadelphia, 88 Pa. St. 309; McDade *v.* Chester, 117 Pa. St. 414, 20 Am. & Eng. Corp. Cas. 440.

Texas.—Fort Worth *v.* Cranford, 8 Am. & Eng. Corp. Cas. 406.

Wisconsin.—Kelley *v.* Milwaukee, 18 Wis. 83; Hubbell *v.* Viroqua, 67 Wis. 343.

No action lies against a city for the negligent exercise or nonexercise of its discretionary powers of a public or legislative character. See Wheeler *v.* City of Poplar Bluff (Mo.), *ante*, 20, and *note*, 28 *et seq.*

Police Powers—Abatement of Nuisances.—See Board of Aldermen of Opelousas *v.* Norman (La.), 1 Mun. Corp. Cas. 413, and *notes*, 418 *et seq.*

SAUNDERS

v.

CITY OF FT. MADISON.

(*Supreme Court of Iowa, April 13, 1900.*)

Personal Injuries Caused by Handling Fire Apparatus—Liability of City.*—A city cannot be held liable for personal injuries resulting from the frightening of a horse by the city's employees while acting in the line of their employment in handling its fire apparatus.

APPEAL by plaintiff from superior court of Keokuk. *Affirmed.*

T. B. Snyder and *B. J. Wellman*, for appellant.

E. C. Weber and *Watson & Weber*, for appellee.

DEEMER, J. The petition alleges, in substance, that while plaintiff was driving along and over one of the streets in defendant city, and when opposite a fire station, its agents and servants, while in the line of their employment, and handling the fire apparatus of the city, negligently, carelessly, and wantonly caused the bell attached to said apparatus to be rung, thus frightening the horse that plaintiff was driving, causing him to run away and throw plaintiff from the vehicle in which she was riding, resulting in serious injury to her person; that these agents and servants, after noticing that plaintiff's horse had become frightened, continued to ring the bell, and refused to desist, although requested by plaintiff to do so. Defendant's demurrer was on the grounds that it is not liable for the action of its agents, servants, or firemen who had control of the fire apparatus, and that in no event is it liable for the willful and malicious

*See notes at end of case.

acts of its agents or servants while handling fire apparatus. This demurrer was sustained, and the question for solution is, is defendant liable for the negligent or careless acts of its agents and servants acting in the line of their duty in caring for the fire apparatus? The doctrine of *respondeat superior* is not applicable to the acts or negligence of all agents and servants of a municipal corporation. Such a corporation, no doubt, has power to purchase and own fire apparatus, and may in some instances appoint the agents who are to manage and care for the same; but it is not, as a general rule, liable for the negligence or carelessness of such agents, for the reason that the service performed is one in which it has no particular interest, and from which it derives no special benefit in its corporate capacity. Such employees are not agents and servants of the city, but act as officers charged with a public service, for whose negligence no action will lie against the city. Where the powers conferred are governmental in nature, the city cannot be made liable for execution thereof. Ogg *v.* City of Lansing, 35 Iowa 495; Calwell *v.* City of Boone, 51 Iowa 687, 2 N. W. 614. In the absence of express statute, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair fire apparatus owned by them, than in the case of public buildings. Hafford *v.* City of New Bedford, 16 Gray 297; Eastman *v.* Meredith, 36 N. H. 284. In Burrill *v.* Augusta, 78 Me. 118, 3 Atl. 177, it appeared that the officers of the fire department carelessly and negligently left a fire engine standing within the limits of a public street in the defendant city, and, while so standing, drew the fire, and permitted the steam to escape with great noise, whereby plaintiff's horse was frightened and ran away, and plaintiff was thrown to the ground and injured. It was held that she could not recover, on the theory that these officers were performing a public duty, acting on their own responsibility, and that they were not officers and agents of the municipality, in such sense as that defendant was responsible for their acts.

Dodge v. Granger (R. I.), 24 Atl. 100, 15 L. R. A. 781, is another case directly in point. There the members of the fire department left a ladder truck standing so that a ladder projected across the sidewalk in front of an engine house, in consequence of which a passer-by was injured. The city was held not liable, because the members of the fire department were public officers, for whose acts the city was not liable. It was also held that it was the duty of the fire department to take care of its apparatus and keep it in proper condition for use, and that in doing this work it was performing the same duty as when actually engaged in extinguishing fires. Liability of the city for unnecessarily obstructing the street was conceded, but the case did not show any negligence in this respect. Wild v. Paterson, 47 N. J. Law 406, 1 Atl. 490, and Welsh v. Village of Rutland, 56 Vt. 228, also involved liability of the city for the negligence of its officers and agents in keeping fire apparatus in good condition and repair; and in each case the city was held not liable for injuries growing out of its negligence in this respect. Negligence of a fireman in opening a door of an engine house so as to strike a passer-by on the sidewalk does not render the city liable. Kies v. City of Erie, 135 Pa. St. 144, 19 Atl. 942. Acts of a voluntary association of firemen are to be regarded like those of paid firemen, in respect to the liability of a city. Torbush v. City of Norwich, 38 Conn. 225, 9 Am. Rep. 395. The following cases also add support to our conclusions: Smith v. City of Rochester, 76 N. Y. 507; Thomas v. City of Findlay, 6 Ohio Cir. Ct. R. 241; Gillespie v. City of Lincoln (Neb.), 52 N. W. 811, 16 L. R. A. 349; Pettingell v. City of Chelsea (Mass.), 37 N. E. 380, 24 L. R. A. 427. The Nebraska case is quite in point, and, following the general tenor of the authorities, it holds that a city is not liable where the injury complained of is due to the negligence of the driver of a ladder truck while exercising a team of horses belonging to the fire department of the city. The demurrer was properly sustained, and the judgment is affirmed.

Notes

Liability of Municipal Corporation for Negligence of Fire Department.—The principal case is in harmony with a long line of authorities unanimously holding that the officers and employees of a city's fire department are public servants and not the mere servants of the municipality, and in the absence of an express statute the city is not liable for their negligence while discharging their duties.

United States.—New York *v.* Workman, 67 Fed. Rep. 348.

California.—Howard *v.* San Francisco, 51 Cal. 52.

Connecticut.—Jewett *v.* New Haven, 38 Conn. 368, 9 Am. Rep. 382; Torbush *v.* Norwich, 38 Conn. 225, 9 Am. Rep. 395.

Georgia.—Simon *v.* Atlanta, 67 Ga. 613, 44 Am. Rep. 739.

Illinois.—Wilcox *v.* City of Chicago, 107 Ill. 334, 6 Am. & Eng. Corp. Cas. 72.

Indiana.—Brinkmeyer *v.* Evansville, 29 Ind. 193.

Iowa.—Ogg *v.* Lansing, 35 Iowa 495; Field *v.* Des Moines, 39 Iowa 575.

Kentucky.—Pollock *v.* Louisville, 18 Bush (Ky.) 221; Greenwood *v.* Louisville, 13 Bush 226, 26 Am. Rep. 263.

Louisiana.—Yule *v.* New Orleans, 25 La. Ann. 394.

Massachusetts.—Fisher *v.* Boston, 104 Mass. 87; Hafford *v.* City of New Bedford, 16 Gray 297; Biglow *v.* Randolph, 14 Gray 541; Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332.

Minnesota.—Grube *v.* St. Paul, 34 Minn. 402.

Mississippi.—Alexander *v.* Vicksburg (Miss.), April, 1891.

Missouri.—Heller *v.* Mayor of Sedalia, 53 Mo. 159; McKenna *v.* St. Louis, 6 Mo. App. 320.

Nebraska.—Gillespie *v.* City of Lincoln (Neb.), 37 Am. & Eng. Corp. Cas. 532.

New Hampshire.—Edgery *v.* Concord, 59 N. H. 78; Eastman *v.* Meredith, 36 N. H. 234.

New Jersey.—Wild *v.* Patterson, 1 Cent. Rep. 189, 47 N. J. L. 406.

New York.—O'Meara *v.* New York, 1 Daly 425; Smith *v.* Rochester, 76 N. Y. 506; Maximilian *v.* Mayor, 62 N. Y. 160; Thompson *v.* New York, 52 N. Y. Super. Ct. 427.

Ohio.—Thomas *v.* Findley, 6 Ohio C. C. 241; Wheeler *v.* Cincinnati, 19 Ohio St. 19; Frederick *v.* Columbus, 58 Ohio St. 538.

Pennsylvania.—Boyd *v.* Insurance Patrol, 5 Cent. Rep. 233, 113 Pa. 269; Knight *v.* Philadelphia, 15 W. N. C. 307; Elliott *v.* Philadelphia, 75 Pa. St. 342; Freeman *v.* Philadelphia, 13 Phila. 154; Fire Ins. Patrol *v.* Boyd, 120 Pa. St. 624, 6 Am. St. Rep. 745; Lilly *v.* Scranton, 2 Lack. Leg. N. (Pa.) 175; Kies *v.* Erie, 135 Pa. St. 144, 20 Am. St. Rep. 867.

Rhode Island.—Dodge *v.* Granger, 17 R. I. 664, 33 Am. St. Rep. 901.

Notes

Tennessee.—Irvine *v.* Chattanooga, 101 Tenn. 291, 47 S. W. R. Rep. 419.

Texas.—Shanewerk *v.* Ft. Worth, 11 Tex. Civ. App. 271.

Vermont.—Welsh *v.* Rutland, 56 Vt. 228, 48 Am. Rep. 762, 7 Am. & Eng. Corp. Cas. 1.

Wisconsin.—Hayes *v.* Oshkosh, 33 Wis. 314.

Canada.—Hesketh *v.* Toronto, 4 Ont. App. 449.

In Wilcox *v.* Chicago, 107 Ill. 334, 339, MR. JUSTICE WALKER, discussing the effect of the doctrine holding the city liable for every neglect of its fire department, said: "It would subject the city to the opinions of witnesses and jurors whether sufficient dispatch was used in reaching the fire after the alarm was given; whether the employees had used the requisite skill for its extinguishment; whether a sufficient force had been provided to secure safety; whether the city had provided proper engines and other appliances to answer the demands of the hazards of fire in the city; and many other things might be named that would form the subject of legal controversy. To permit recoveries to be had for all such and other acts would virtually render the city an insurer of every person's property within the limits of its jurisdiction. It would assuredly become too burthensome to be borne by the people of any large city, where loss by fire is annually counted by the hundreds of thousands, if not by the millions. * * * To allow recoveries for the negligence of the fire department would almost certainly subject property holders to as great, if not greater, burthens than are suffered from the damages from fire. Sound public policy would forbid it, if it was not prohibited by authority."

Illustrations of General Rule.—In the following cases a municipal corporation was declared not liable for injuries sustained, directly or indirectly, through the operation or maintenance of its fire department:

Accidents from Defects in Fire Apparatus.—In Fisher *v.* Boston, 104 Mass. 87, 6 Am. Rep. 196, the city was held not to be liable for a personal injury to the plaintiff caused by the bursting of the hose attached to a fire engine. GRAY, J., said: "In the absence of express statute, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them than in the case of a town-house or a public way. It makes no difference whether the legislature itself prescribes the duties of the officers charged with the repair and management of fire engines, or delegates to the city or town the definition of those duties by ordinance or by-law. However appointed or elected, such persons are public officers, who perform duties imposed by the law for the benefit of all the citizens, the performance

Notes

of which the city or town has no control over and derives no benefit from in its corporate capacity. The acts of such public officers are their own official acts, and not the acts of the municipal corporation of its agents." See also Wild *v.* Patterson, 47 N. J. L. 406.

Defective Engine House.—In Kies *v.* City of Erie, Pa. Sup. Ct., 1890, an action was brought against the city of Erie for personal injuries received by plaintiff from being struck by the door of a fire engine house which was suddenly opened as plaintiff was walking by on the sidewalk. The plaintiff was nonsuited. In affirming the judgment of the lower court, PAXSON, C. J., said: "It has been held in numerous cases that a municipal corporation is not responsible for the acts of its policeman and fireman. In other words the doctrine of *respondeat superior* does not apply in such cases. It is sufficient to refer to Knight *v.* City of Philadelphia, 15 W. N. C. Pa. 307, and Fire Insurance Patrol *v.* Boyd, 120 Pa. St. 624, 29 Am. & Eng. Corp. Cas. 633."

Failure to Notify Members of Fire Department of Defects in Fire Apparatus.—Frederick *v.* Columbus, 58 Ohio St. 629, 51 N. E. Rep. 35.

Injuries from Opening Door of Engine House.—Kies *v.* Erie, 135 Pa. St. 144, 20 Am. St. Rep. 867.

Failure to Instruct Fire Department in Use of Apparatus.—Frederick *v.* Columbus, 58 Ohio St. 538, 51 N. E. Rep. 35.

Accidents from Driving Fire Engines.—In Hafford *v.* New Bedford, 16 Gray (Mass.) 297, certain members of the fire department, established by the city, ran over and injured the plaintiff, while drawing a hose-carriage on their way to a fire. In holding that the city was not liable, BIGELOW, C. J., said: "The members of the fire department of New Bedford, when acting in the discharge of their duties, are not servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as officers of the city, charged with the performance of a certain public duty or service, and no action will lie against the city for their negligence or improper conduct while acting in the discharge of their official duty."

In Jewett *v.* New Haven, 38 Conn. 368, the plaintiff, while driving in a public highway in the city, was negligently run into and injured by the driver of a hose-cart, a member of the fire department, who was hastening to the engine house to procure additional hose for use at a fire. It was held that the members of the fire department, when engaged in extinguishing fires, are performing a public, governmental act for the general good, and cannot be regarded as servants of the city, for whose negligence it can be held liable. PARK, J., observed: "The utter insufficiency of the old mode of extinguishing fires led the ingenuity of man to devise a better one, and his wisdom

Notes

brought forth the present system as a substitute; so that when an alarm of fire is now made, instead of a promiscuous body of men with buckets and pails, comes the city itself, with its fire department and powerful engines, to stay the conflagration. Although the two systems differ widely in the degree of their efficiency, still in principle they are the same. If I assist my neighbor in the extinguishment of his fire, I am laboring for him—for his benefit. Can it make any difference whether I am alone or with others? and if with others whether we act together or separately? whether we are organized or unorganized? whether we have improvements adapted to the purpose of extinguishing fires, or have none that we can use to advantage? In either case I am still laboring for my neighbor whose building is on fire. * * * The fire department is more the servant of the citizens than it is of the city. The city is constituted merely the governing power to give it efficiency. But it is said the fire department of New Haven are paid for their services, and that this is an important consideration in determining whether the relation of master and servant exists in a given case. It may be important as evidence, but it is no criterion to determine the fact. One man may be the servant of another, and a third party may pay his wages on a contract between him and a third party. One man may give his services to another, and still the relation of master and servant may exist between them. Wages may be paid, and still the relation of master and servant may not exist—which is the case in question. And, furthermore, public servants are paid for their services as well as private ones. A body of efficient men cannot be obtained in any other way. A majority of the court are satisfied that the relation of master and servant does not exist between the city and its fire department."

In Knight *v.* Philadelphia, 15 W. N. C. (Pa.) 307, it was held that a city is not liable for injuries caused by the negligent driving of a fire engine by an employee of the fire department. The court say: "The members of the fire department are not such servants of the municipal corporations as to make it liable for their acts of negligence. Their duties are of a public character and for a high order of public benefit. The fact that the act of assembly did not make it obligatory on the city to organize a fire department does not change the legal liability of the municipality for the conduct of the members of the organization. The same reason which exempts the city from liability for the acts of its policemen applies with equal force to the acts of its firemen." It was held otherwise, by the lower court, in Buchanan *v.* Philadelphia, 2 W. N. C. Pa. 600.

In O'Meara *v.* New York, 1 Daly (N. Y.) 425, the plaintiff, while standing on the sidewalk, was knocked down and run over by a fire

Notes

engine in the charge of firemen, which was running upon the sidewalk in violation of a city ordinance. It was ruled that the city was not liable. The mere fact that the firemen had at the time an engine in their possession by the authority of the mayor and common council did not create the relation of master and servant.

In Smith *v.* Rochester, 76 N. Y. 506, defendant's common council appointed for a committee to make arrangements for the "Centennial" celebration. The committee directed the fire department to be in front of the city hall at midnight of December 31, 1875. One of the defendant's hose-carts, which was being driven rapidly and negligently along a street on its way to the place designated, ran over and injured the plaintiff. *Held*, that the calling out of the hose-cart for such purpose was not authorized, and defendant was not liable; that the ownership of the horses and hose-cart by the city did not make it responsible for the negligent acts of its servants having control of them, when using them in a service not authorized by law. See also Greenwood *v.* Louisville, 13 Bush (Ky.) 226; Grube *v.* St. Paul, 34 Minn. 402.

Negligence in Operating Fire Engine.—Hayes *v.* Oshkosh, 33 Wis. 314, 14 Am. Rep. 760.

Flooding Other Buildings.—Torbush *v.* Norwich, 38 Conn. 228.

Horse Frightened by Steam from Fire Engine.—Burrill *v.* Augusta, 78 Me. 118, 57 Am. Rep. 788.

Horse Frightened by Hose.—Edgerly *v.* Concord, 59 N. H. 78.

Rope Stretched across Street during Parade. — Simon *v.* Atlanta, 67 Ga. 618, 44 Am. Rep. 739.

Truck Standing on Sidewalk.—Dodge *v.* Granger, 17 R. I. 664, 13 Am. St. Rep. 901.

Negligence in Thawing Hydrant — Ice in Street.—An incorporated village is not liable for injuries resulting from the negligence of an engineer of its fire department in thawing out a hydrant. Welsh *v.* Rutland, 56 Vt. 228, 7 Am. & Eng. Corp. Cas. 1.

Falling of Fire Tower.—Frederick *v.* Columbus, 58 Ohio St. 538.

Negligence in Failing to Extinguish Fire.—Wright *v.* Augusta, 78 Ga. 242; Robinson *v.* Evansville, 87 Ind. 336, 44 Am. Rep. 770; Yule *v.* New Orleans, 25 La. Ann. 394; Heller *v.* Sedalia, 53 Mo. 159, 14 Am. Rep. 444; Western College of Medicine *v.* City of Cleveland, 12 Ohio St. 375; Irvine *v.* Chattanooga, 101 Tenn. 291, 47 S. W. Rep. 419.

L'HOTE AND THE CHURCH EXTENSION SOCIETY OF THE METHODIST EPISCOPAL CHURCH

v.

CITY OF NEW ORLEANS.

(*Supreme Court of the United States, May 14, 1900.*)

Ordinance to Prevent Prostitutes from Residing within Certain Limits—Constitutional Law.*—A city ordinance prescribing limits in the city, outside of which no woman of lewd character shall dwell, but providing that nothing therein shall be so construed as to authorize any lewd woman to occupy a house, room, or closet in any portion of the city, does not deprive a person who may own or occupy property in or adjacent to such prescribed limits of any right secured by the federal constitution, so as to entitle such person to enjoin the enforcement of the ordinance.

ERROR by plaintiffs to the state of Louisiana supreme court. *Affirmed.*

For report of case in supreme court of Louisiana, see 1 Mun. Corp. Cas. 237.

Statement by MR. JUSTICE BREWER:

By ordinance No. 13,032, council series, approved January 29th, 1897, it was ordained by the common council of the city of New Orleans:

"That from the first of October, 1897, it shall be unlawful for any public prostitute or woman notoriously abandoned to lewdness to occupy, inhabit, live, or sleep in any house, room, or closet, situated without the following limits: South side of Custom house street from Basin to Robertson street, east side of Robertson street from Custom House to St. Louis street, south side of St. Louis street from Robertson to Basin street. *Provided*, That no lewd woman shall be permitted to occupy a house, room, or closet on St. Louis street. *Provided*

*See *foot-note*, 1 Mun. Corp. Cas. 237.

further, That nothing herein shall be so construed as to authorize any lewd woman to occupy a house, room, or closet in any portion of the city. § 2. That it shall be unlawful for any person or persons, whether agent or owner, to rent, lease, or hire any house, building, or room to any woman or girl notoriously abandoned to lewdness or for immoral purposes outside the limits specified in section 1 of this ordinance. § 3. That public prostitutes or notoriously lewd and abandoned women are forbidden to stand upon the sidewalks in front of or near the premises they may occupy, or at the alleyway, door, or gate of such premises, or to occupy the steps thereof, or to accost, call, or stop any person passing by, or to walk up and down the sidewalks, or to stroll about the city streets indecently attired, or in other respects so as to behave in public as to occasion scandal, or to disturb and offend the peace and good morals of the people. § 4. That it shall not be lawful for any lewd women to frequent any cabaret or coffee house or bar room and to drink therein. § 5. That it shall be unlawful for any party or parties to establish or carry on a house of prostitution or assignation without the limits specified in section — of this ordinance. § 6. That wherever a house of prostitution or assignation within or without the limits established by this ordinance may become dangerous to public morals, either from the manner in which it is conducted or the character of the neighborhood in which it is situated, the mayor may, on such facts coming to his knowledge, order the occupants, of such house, building, or room to remove therefrom within a delay of five days, by service of notice on such occupants in person, or by posting the notice on the door of the house, building, or room, to remove therefrom within a delay of five days, and upon such occupants failing to do so, each shall be punished as provided in section — of this ordinance § 7. That in the event that the occupants of such house, building, or room referred to in section 6 do not remove therefrom after the infliction of the penalty, the mayor is authorized to close the same and to place a policeman at the door of such premises to warn away

all such parties who shall undertake to enter. § 8. That any person or persons who shall violate the provisions of this ordinance, or who shall disturb the tranquillity of the neighborhood or commit a breach of peace, shall be punished by the recorder having jurisdiction, for the first offence by a fine not exceeding $5, and in default of payment by imprisonment not exceeding ten days, for the second offence by a fine not exceeding $10, and in default of payment by imprisonment not exceeding twenty days, and for any subsequent offence by a fine not exceeding $25, and in default of payment by imprisonment not exceeding thirty days. § 9. That each day any person or persons shall continue to violate the provisions of this ordinance shall constitute a separate offence. § 10. That on and from the day this ordinance takes effect all ordinances in conflict therewith be and the same are hereby repealed, provided that nothing herein contained shall affect ordinance 12,456, C. S., relative to prostitutes in the fifth district."

By ordinance No. 13,485, council series of the city of New Orleans, approved July 7th, 1897, it was ordained: "That section 1 of ordinance 13,032, C. S., be and the same is hereby amended as follows: From and after the 1st of October, 1897, it shall be unlawful for any public prostitute or woman notoriously abandoned to lewdness to occupy, inhabit, live, or sleep in any house, room, or closet situate without the following limits, *viz.*: 1. From the south side of Custom House street to the north side of St. Louis street, and from the lower or wood side of North Basin street to the lower or wood side of Robertson street. 2. And from the upper side of Perdido street to the lower side of Gravier street, and from the river side of Franklin street to the lower or wood side of Locust street, *provided* that nothing herein shall be so construed as to authorize any lewd woman to occupy a house, room, or closet in any portion of the city. Be it further ordained, That section 1 of ordinance 13,032, C. S., as amended above, be and the same is hereby re-enacted."

L'Hote *v.* City of New Orleans

The above ordinance being in force, the plaintiff in error George L'Hote, a resident, citizen, and taxpayer of New Orleans, brought this action in the civil district court for the parish of Orleans against the city of New Orleans, its mayor and superintendent of police, on behalf of himself and all other persons similarly situated, who might intervene and bear their proportion of costs and expenses. The object of the suit was to obtain a decree enjoining and prohibiting the defendants from in any manner enforcing ordinance No. 13,-032 as amended by section 1 of ordinance No. 13,485.

The bill alleged that the plaintiff was the owner of property situated in the square bounded by St. Louis, Franklin, Treme, and Toulouse streets in the second district of the city of New Orleans, and resided with his wife and children in that square at No. 522 Treme street; that the chief and principal way of approach to his residence, and for ingress and egress thereto, was in, through, and from St. Louis streets; that the locality in which he resided was, at the commencement of the action, and had always been, used for private residences, schools, groceries, and other mercantile establishments; that the people residing in that locality were then and had always been moral, virtuous, sober, law-abiding, and peaceful; that the locality referred to was not then and never had been dedicated to immoral purposes or used for dwelling places and as the refuge of public prostitutes, lewd and abandoned women and the necessary attendants thereof, drunkards, idle, vicious, and disorderly persons, who gather around them to gratify their depraved appetites, and who were regarded as dangerous to the peace and welfare of the community, their presence at any place being always a just cause of alarm and apprehension;

That the above ordinances were unconstitutional, illegal, unreasonable, and oppressive, and would, if executed, work irreparable injury, wrong, and damage to the plaintiff;

That the council in enacting those ordinances pretended to have acted under and by virtue of the power conferred upon them in § 15 of act No. 45, approved July 7th, 1896,

"to regulate the police of houses of prostitution and assignation and to close such houses in certain limits, and shall have the power to exclude the same, and to authorize the mayor and police to close said places;" and

That the enforcement of those ordinances in the manner provided for violated the provisions both of the Constitution of the United States and of the state, and would deprive the plaintiff of his property without due process of law, and amount to a taking or damaging of such property for public purposes without just and adequate compensation being first paid.

The bill further alleged that "the introduction of public prostitutes, women notoriously abandoned to lewdness, in said locality, authorizing them to occupy, inhabit, live, and sleep in houses and rooms situated therein, will materially lessen and depreciate the value of your petitioner's property, render his dwelling and the dwelling of his neighbors similarly situated unfit for the occupancy of private families, destroy the morals, peace, and good order of the neighborhood, drive out and turn away the law-abiding, virtuous citizens and their families from said locality, and dedicate the same to public and private nuisances *per se*, contrary to law and good morals;"

That "the common council of the city of New Orleans had previously designated the limits within which prostitutes and women notoriously abandoned to lewdness should inhabit and live, and had thereby exhausted whatever power was vested in them by legislature of the state and were without legal right to alter, change, or modify the same to the injury, detriment, and damage of your petitioner and others residing in said locality, which said council have attempted to include within said limits; that, having so exhausted the authority conferred upon them by the legislature, the said council was without power to capriciously change the limits previously established by them; that the avocations plied by public prostitutes and women notoriously abandoned to lewdness are *contra bonos mores*, and

the said common council of the city of New Orleans have no right, power, or authority to legalize the same and to permit such persons to reside in the said vicinity in which your petitioner and others dwell with their families;"

That "there was no good and sufficient reason for the enactment of said ordinance or the changing of the limits previously existing and established;"

That "said council, in enacting said ordinance No. 13,485, council series, eliminated and excluded a large area of the city which had been previously dedicated to the occupancy of lewd and abandoned women, to the detriment and injury of petitioner, by changing said limits so as to include St. Louis street in his locality;"

That the execution of the ordinances would render plaintiff's dwelling house and those of his neighbors unfit and unsuitable for the occupancy of their families, wives and children, and wholly valueless for the purposes for which they were constructed and had theretofore been used; and

That the plaintiff and others similarly situated would be compelled, if the ordinances were executed, to abandon and remove from their dwellings at great trouble, expense, and annoyance, and that the enforcement of the ordinance would oppress, injure, and seriously damage and incommode the plaintiff and all others similarly situated.

The plaintiff also averred that the ordinances if executed would deprive him and others similarly situated of the equal protection of the laws and be in violation equally of the Constitution and laws of the United States and of the state; that, under the laws and ordinances of the city as they existed, he and all others similarly situated in the locality had the right to cause houses of prostitution and assignation suppressed as nuisances *per se* and the inmates arrested and forced to vacate and remove therefrom, and of that right the plaintiff had theretofore availed himself; and that the ordinances if executed would legalize such nuisance and take away the rights of citizens theretofore existing and vested in plaintiff and others residing in that locality.

L'Hote *v.* City of New Orleans

After alleging that the enforcement of the ordinance would work irreparable damage and injury to him in the depreciation in value of his property, because it would cease to be a fit and proper place for the dwelling house of himself, his wife, and children, and necessitate their abandonment of the same and removal from the locality, he prayed that the ordinances might be declared null and void.

The writ of injunction as prayed was directed to be issued.

The city of New Orleans, its mayor and superintendent of police, pleaded that the court was without jurisdiction *ratione materiæ*.

Bernardo Gonzales Carbajal intervened by petition, and after alleging that he was the owner of certain improved property within the limits prescribed by the above ordinances, reiterated all the allegations of the petition of L'Hote so far as they related to his property, and averred that the enforcement of the ordinances would work great and irreparable injury to him and depreciate his property by rendering it unfit and unsuitable for dwelling houses. He united in the prayer that the ordinances be declared null and void.

The Church Extension Society of the Methodist Episcopal Church, a corporation chartered and organized under the laws of Pennsylvania, also intervened, and alleged that it was the owner of buildings and improvements within the above district which were used and occupied for church purposes; that a religious congregation known as the Union Chapel of the Methodist Episcopal Church assembled and worshipped therein on each and every Sabbath and on Tuesday and Friday evenings, as well as on other stated occasions; that besides the religious services conducted in that church a Sunday school was organized and established which was attended by 170 children, who received religious instruction and teaching, and that the membership of that congregation consisted of about 300 persons, while those worshiping in the church numbered about 600 persons.

The society reiterated all the allegations of the plaintiff's petition and alleged that if the ordinances were enforced the

value of its property would be destroyed and the same would be unfit for the purposes for which it was erected and was now being used, enjoyed, and occupied; that the threats to enforce the ordinances had already caused a portion of the congregation attending the church to cease from attending therein; that, encouraged by the action of the city council of New Orleans in passing the ordinances, a number of lewd and abandoned women had already taken up their abode and habitation in the vicinity of the church and were plying their vocation as prostitutes; and that a number of houses were then in progress of erection and construction which were intended to be used and kept as brothels and houses of prostitution, and other places had been leased and let for the purpose of carrying on liquor saloons and concert halls, for the purpose and with the intention of changing the hitherto respectable character of that neighborhood into a resort for vice and the establishment of nuisances *mala in se*.

After averring that the above ordinances were in violation of the Constitution of the United States and the Constitution and laws of Louisiana, and that the city council had no right to destroy the value of the intervener's property and render the neighborhood in which the same was located the resort of lewd and abandoned women, it united in the prayer of the plaintiff's petition that those ordinances be declared null and void.

The exceptions filed by the defendants to the petitions of the plaintiff and the interveners having been overruled, the city of New Orleans and its chief of police filed an answer averring that the ordinances in question were legal and that their enforcement would be a lawful exercise of the power conferred upon the city, and especially a valid exercise of the power conferred upon it by act No. 45 of 1896.

The civil district court rendered judgment in favor of the plaintiff, but in favor of the city against the interveners. From that judgment suspensive appeals were allowed and prosecuted by the city as well as by the Church Extension Society.

By the final judgment of the supreme court of Louisiana the judgment of the civil district court in favor of the plaintiff was reversed, and the injunction obtained by him was dissolved and his suit dismissed, while the judgment dismissing the intervening petitions and dissolving the injunction granted on behalf of the interveners was affirmed. 51 La. Ann. 93, 44 L. R. A. 90, 24 So. 608.

Mr. E. H. McCaleb for plaintiffs in error.

Messrs. J. J. McLoughlin, Samuel L. Gilmore, and *Branch K. Miller* for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court:

The question presented in this case is whether an ordinance of the city of New Orleans prescribing limits in that city, outside of which no woman of lewd character shall dwell, operates to deprive these plaintiffs in error of any right secured by the Constitution of the United States. It is well, in the first place, to look at the negative side and see what is not involved. No woman of that character is challenging its validity; there is no complaint by her that she is deprived of any personal rights, either as to the control of her life or the selection of an abiding place. She is not saying that she is denied the right to select a home where she may desire, or that her personal conduct is in any way interfered with. In brief, the persons named in the ordinance, and against whom its provisions are directed, do not question its validity.

In the second place, no person owning buildings outside of the prescribed limits is complaining that he is deprived of a possible tenant by virtue of the ordinance, or saying that the abridgment of her freedom of domicil operates to cut down the amount of his rents.

In the third place, it will be perceived that the ordinance does not attempt to give to persons of such character license to carry on their business in any way they see fit, or, indeed, to carry it on at all, or to conduct themselves in such a manner as to disturb the public peace within the prescribed limits. Clauses 3 and 4 of the first section of the ordinance are clearly

designed to restrain any public manifestation of the vocation which these persons pursue, and to keep so far as possible unseen from public gaze the character of their lives, while clauses 6, 7, 8 and 9 provide means for enforcing order and preventing disturbances of the peace.

The question, therefore, is simply whether one who may own or occupy property in or adjacent to the prescribed limits, whether occupied as a residence or for other purposes, can prevent the enforcement of such an ordinance on the ground that by it his rights under the Federal Constitution are invaded.

In this respect we premise by saying that one of the difficult social problems of the day is what shall be done in respect to those vocations which minister to and feed upon human weaknesses, appetites, and passions. The management of these vocations comes directly within the scope of what is known as the police power. They affect directly the public health and morals. Their management becomes a matter of growing importance, especially in our larger cities, where from the very density of population the things which minister to vice tend to increase and multiply. It has been often said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the states, and that upon them rests the duty of so exercising it as to protect the public health and morals. While, of course, that power cannot be exercised by the states in any way to infringe upon the powers expressly granted to Congress, yet until there is some invasion of congressional power or of private rights secured by the Constitution of the United States, the action of the states is this respect is beyond question in the courts of the nation. In Barbier *v.* Connolly, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357, 359, it was said:

"But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to

prescribe regulations to promote the health, peace, morals, education, and good order of the people."

See also Hannibal & St. J. R. Co. *v.* Husen, 95 U. S. 465, 24 L. Ed. 527; Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Patterson *v.* Kentucky, 97 U. S. 501, 24 L. Ed. 1115; Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Plumley *v.* Massachusetts, 155 U. S. 461, 39 L. Ed. 223, 15 Sup. Ct. Rep. 154, and cases in the opinion.

Obviously, the regulation of houses of ill fame, legislation in respect to women of loose character, may involve one of three possibilities: First, absolute prohibition; second, full freedom in respect to place, coupled with rules of conduct; or, third, a restriction of the location of such houses to certain defined limits. Whatever course of conduct the legislature may adopt is in a general way conclusive upon all courts, state or Federal. It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature.

Now, this ordinance neither prohibits absolutely nor gives entire freedom to the vocation of these women. It attempts to confine their domicil, their lives, to certain territorial limits. Upon what ground shall it be adjudged that such restriction is unjustifiable; that it is an unwarranted exercise of the police power? Is the power to control and regulate limited only as to the matter of territory? May that not be one of the wisest and safest methods of dealing with the problem? At any rate, can the power to so regulate be denied? But given the power to limit the vocation of these persons to certain localities, and no one can question the legality of the location. The power to prescribe a limitation carries with it the power to discriminate against one citizen and in favor of another. Some must suffer by the establishment of any territorial boundaries. We do not question what is so earnestly said by counsel for plaintiffs in error in respect to the disagreeable results from the neighborhood of such houses and people; but if the power to prescribe terri-

torial limits exists, the courts cannot say that the limits shall be other than those the legislative body prescribes. If these limits hurt the present plaintiffs in error, other limits would hurt others. But clearly the inquiry as to the reasonableness or propriety of the limits is a matter for legislative consideration, and cannot become the basis of judicial action. The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors. Because the legislative body is unable to protect all, must it be denied the power to protect any?

It is said that this operates to depreciate the pecuniary value of the property belonging to the plaintiffs in error, but a similar result would follow if other limits were prescribed, and therefore the power to prescribe limits could never be exercised, because, whatever the limits, it might operate to the pecuniary disadvantage of some property holders.

The truth is, that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character.

Among the cases in which this question has been presented may be noticed Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 24 L. Ed. 1036, and Mugler *v.* Kansas, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273. In the first of these cases an act of the general assembly of the state of Illinois had authorized the fertilizing company to establish a plant for the purpose of converting dead animals into an agricultural fertilizer. In pursuance of this authority the company had built its factory outside the then limits of the city of Chicago and in a territory adjacent to which there was no population. As the years rolled by population gathered around the factory, and the character of the work carried on was such as to make it a nuisance to the neighborhood. The village of Hyde Park, which had grown up around the works of the company, passed an ordinance to suppress these works, and a bill was filed in the state court to restrain the enforcement of that ordinance. The supreme court of the

state held the ordinance valid, and on error to this court that judgment was affirmed. Although there was a charter right to maintain these works, and although when established they were located in a territory in which there was no population, yet when population had gathered around them the police power of the state was held sufficient to stop their existence, and that without compensation to owner. The pecuniary injury which directly resulted to the company from the stoppage of its works was held no bar to the police power of the state. In the other case Mugler had established a brewery in Kansas, when such an institution was authorized by the laws of the state. The buildings and machinery were of little value except for the purpose of manufacturing beer. Yet when Kansas, in the exercise of its police power, determined that the manufacture of beer should cease, it was ruled by this court that the pecuniary loss to Mugler did not justify any restraint of the legislative acts prohibiting the manufacture of beer. Each individual holds his property subject to the ordinary and reasonable exercise of the police power, and the fact that its exercise may in a particular case work pecuniary injury was adjudged insufficient to stay the legislative action. It is true those cases involved pecuniary injury to the persons whose action was prohibited, but it cannot be that the police power of a state can be stayed because it works injury to one person, and not stayed if it works injury to another.

In 1 Dill. Mun. Corp. 4th Ed. § 141, the rule is thus stated:

"Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled 'Police Laws or Regulations.' It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury it is either *damnum absque injuria*, or, in

the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not unreasonably to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally."

The learned author, in these and accompanying sentences, is discussing the rule when legislative action operates directly upon the property of the complainant and where injuries alleged to result are the direct consequence of legislative action. If under such circumstances the individual has no cause of action, *a fortiori* must the same be true when the injuries are not direct but consequential, when his property is not directly touched by the legislative action but is affected in only an incidental and consequential way. Here the ordinance in no manner touched the property of the plaintiffs. It subjected that property to no burden, it cast no duty or restraint upon it, and only in an indirect way can it be said that its pecuniary value was affected by this ordinance. Who can say in advance that in proximity to their property any houses of the character indicated will be established, or that any persons of loose character will find near by a home? They may go to the other end of the named district. All that can be said is that by narrowing the limits within which such houses and people must be, the greater the probability of their near location. Even if any such establishment should be located in proximity, there is nothing in the ordinance to deny the ordinary right of the individual to restrain a private nuisance. Under these circumstances we are of the opinion that the ordinance in question is not one of which the plaintiffs in error can complain. *The judgment of the Supreme Court of Louisiana is therefore affirmed.*

ADAMS

v.

CITY OF SHELBYVILLE.

(*Supreme Court of Indiana, April 27, 1900.*)

Local Assessments—Frontage Rule—Constitutional Law.*—The imposition of assessments for local improvements per front foot, irrespective of the question of accruing benefits, is in violation of the fourteenth amendment to the federal constitution.

Same—Taxing Districts—Constitutional Law.*—The legislature may create, or authorize a municipality to create, a local taxing district for local improvement purposes, which includes part only of the property within the municipality; and may declare conclusively that only the property within the taxing district shall be specially assessed on account of local improvements within such district.

Same—Same—Same.—Each parcel of contributing property within such a district may be assessed only to the extent of the special benefits actually received by it.

Same—Same—Same.—Such a taxing district, as a whole, may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of its contributing property.

Same—Same—Same.—Such an improvement, so far as its cost exceeds the special benefits resulting to the several parcels of contributing property in such a taxing district, is a benefit to the municipality at large, and such excess must be borne by the municipal treasury.

Same—Same—Same—Rights of Property Owners.—Property owners affected by such an improvement within such a taxing district are entitled to a hearing on the question of special benefits.

Same—Authority to Adjust Special Benefits—Constitutional Law.—The legislature may confer upon municipal officers the power to adjust special benefits accruing from local improvements to a fair and just basis.

Same—Frontage Rule—Construction of Statute.—The "Barrett Law" of Indiana does not require that the costs of street and alley

*See notes at end of case.

improvements shall be assessed against abutting property by the front-foot rule, without regard to the question of resulting benefits.

Same—Constitutionality of Statute.—Such statute supplies to affected property owners "due process of law," and is not obnoxious to any provisions of the state or federal constitution.

Same—Ornamental Improvements—Authority of Common Council.—The common council of a city cannot impose local assessments for an improvement purely ornamental, without express statutory authority.

Same—Same—Same.—Authority to require the planting of shade trees in a street at the expense of abutters does not carry with it the power to construct lawns or other decorations in the street, and to impose the cost thereof against the abutters.

Same—Same—Same—Validity of Ordinance—Right of Property Owner to Enjoin.—Where the common council of a city had merely authority to grade and pave a street and its sidewalk and impose the cost thereof upon the abutting owners, it was *ultra vires* in them to pass an ordinance requiring, among other things, that a space between the brick portion of the sidewalk and a proposed curb, required because of the proposed outward extension of the sidewalk, should be filled with rich dirt and sodded at the expense of such abutters; and one of such abutters was entitled to enjoin so much of the proposed improvement.

APPEAL by plaintiff from Shelby county circuit court. *Reversed.*

Adams & Carter and *Love & Morrison*, for appellant.

Elliott, Elliott & Littleton, Lisher & Chez, Wilson & Yarling, Nelson & Myers, and *McConnel & Jenkins*, for appellee.

HADLEY, C. J. Appellant brought this suit to restrain appellee from improving a street on which he owned an abutting lot. Shelbyville has less than 10,000 inhabitants, and the proceedings for the proposed improvements were instituted under the statute commonly known as the "Barrett Law" (sections 4288–4298, Burns' Rev. St. 1894; sections 6771–6780, Horner's Rev. St. 1897). On August 2, 1898, the common council, without any petition from the owners of the property affected, passed a resolution declaring a necessity

Case Stated.

for the improvement, the same to be executed as follows: "There shall be set and erected a curb of oolitic stone four inches thick, twenty inches wide, and not less than five feet in length, to be set twenty-two feet from the lot line outward, set to grade, set on a good bed of sand four inches thick, and to be dressed so that, when set and completed, the part of curbing that is exposed will show as dressed; the joints all to fit neat and smooth, and make close connection; and the space between the brick sidewalk on said part of said street shall be filled with good, rich dirt, and properly graded and made smooth, and when grade is made to be covered with good, live, fresh sod, to be on grade with the curbing and the brick sidewalk; * * * and that the cost and expense thereof, including advertising, labor, and material for the same, be assessed against the property on the line and collected according to the provisions of an act of the general assembly of the state of Indiana approved March 8, 1889, and amendments thereto;" and that notice should be given by publication that the common council, on August 30, 1898, at their chamber, would receive sealed proposals for the execution of the work, and would hear property owners' objections to the necessity for the construction thereof. On August 26, 1898, appellant filed his complaint stating the foregoing facts, and alleging that the street to be improved is 100 feet wide, and the proposed widening of the sidewalks to 22 feet on each side will reduce the roadway to about 55 feet; that the making of said improvement will cost about $1 per lineal foot, which it is proposed the abutting property owners shall pay; that it will inconvenience the plaintiff and other property owners, and make their property less valuable, because of the inconvenience in getting to and from the traveled roadway; that will be of no benefit to the plaintiff, and damage him $100. The sustaining of a demurrer to the complaint for want of facts is the only error assigned.

Council, in the introduction of their respective briefs, epigrammatically state the principal issue in this court thus:

"Is the 'Barrett Law' law?" "The 'Barrett Law' is law." "The 'Barrett Law' is not law."

We will not stop now to inquire whether the demurrer to the complaint should have been overruled for a minor cause, since the appellant, as indicated by his argument, has based his appeal principally upon the question of the statute's constitutionality, and for the present the complaint will be taken as admitting that the city intends to proceed in accordance with the provisions of the statute. Appellant's contention is that the statute, in violation of the federal and state constitutions, provides for the taking of property without just compensation, and without due process of law. Two propositions are involved : (1) Is the method of assessing the whole cost of a street improvement upon the abutting property equally by the frontage, irrespective of accruing benefits and damages, constitutional? (2) Is that the method required by the Barrett law?

Many of the courts of this country have answered the first question in the affirmative. Cooley, Tax'n (2d Ed.; 1886) p. 644, says: "In many instances, where streets were to be opened or improved, sewers constructed, water pipes laid, or other improvements entered upon, the benefits of which might be expected to diffuse themselves along the line of the improvement in a degree bearing some proportion to the frontage, the legislature has deemed it right and proper to take the line of frontage as the most practicable and reasonable measure of probable benefits, and, making that the standard, to apportion the benefits accordingly. Such a measure of apportionment seems, at first blush, to be perfectly arbitrary, and likely to operate in some cases with great injustice; but it cannot be denied that, in the case of some improvements, frontage is a very reasonable measure of benefits,—much more just than value could be,—and perhaps approaching equality, as nearly as any estimate of benefits made by the judgment of men. However this may be, the authorities are well united in the conclusion that frontage may lawfully be made the basis of apportionment."

Adams *v.* City of Shelbyville

In his treatise on Municipal Corporations, published in 1890, Dillon gives an extended review of the subject, and notes that the courts are very generally agreed that the authority to require property specially benefited to bear the expense of local improvements is embraced within the taxing power, and that a statute authorizing municipal authorities to make such improvements, and assess the cost in proportion to the frontage, in the absence of some special constitutional restriction, is a valid exercise of the power of taxation, and, according to the weight of authority, is considered to be a question of legislative expediency. Dill. Mun. Corp. (4th Ed.) §§ 752–761. And, as upholding the doctrine of the majority, the author notes (section 760) that the supreme court of the United States holds that state laws imposing upon property, according to legislative discretion, the cost of local improvements, do not deprive the owner of his property without due process of law, within the meaning of the fourteenth amendment. Davidson *v.* New Orleans (1877) 96 U. S. 97, 104, 24 L. Ed. 616; Mobile Co. *v.* Kimball (1880) 102 U. S. 691, 26 L. Ed. 238; Hagar *v.* Reclamation Dist. (1883) 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Wurtz *v.* Hoagland (1884) 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; Walston *v.* Nevin (1888) 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544. To which may be added Spencer *v.* Merchant (1887) 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Williams *v.* Eggleston (1898) 170 U. S. 304, 311, 18 Sup. Ct. 617, 42 L. Ed. 1047; Parsons *v.* District of Columbia (1898) 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943. The author, however, after considering many cases *pro* and *con*, and summing up the general principles underlying special assessments in his eighth conclusion (section 761), affirms what he conceives to be the only true rule upon principle, as follows: "Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the

improvement, thus for itself conclusively determining, not only that such property is specially benefited, but that it is thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards of officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the states. But since the period when express provisions have been made in many of the state constitutions, requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that special benefits actually received by each parcel of contributing property was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must, upon principle, be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited, and, since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury."

Among the many cases cited by the author in support of his conclusion is Tide-Water Co. *v.* Coster, 18 N. J Eq. 518, where it is said, on page 527: "Where lands are improved by legislative action, on the ground of public utility, the cost of such improvement, it has been frequently held, may, to a certain degree, be imposed on the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system, it is not considered that the property of the individual, or any part of it, is taken from him for the public use, because he is compensated in the enhanced value of such property. But it is clear this principle is only

applicable when the benefit is commensurate to the burthen; when that which is received by the landowner is equal or superior in value to the sum exacted; for, if the sum exacted be in excess, then to that extent, most incontestably, private property is assumed by the public. Nor as to this excess can it be successfully maintained that such imposition is legitimate as an exercise of the power of taxation. Such an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest. The owners of these waste lands have a special concern in such improvement, so far as their lands will be in a peculiar manner benefited. Beyond this, their situation is the same as that of the rest of the community. The consideration for the excess of the cost of the improvement over the enhancement of the property, within the operation of this act, is the public benefit. How, then, upon any principle of taxation, can this portion of the expense be thrown exclusively upon certain individuals? The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle which will permit the expense incurred in conferring such benefit upon the public to be laid in the form of a tax upon certain persons, who are designated, not, indeed, by name, but by their description, as the owners of certain lands."

In the recent case of Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, filed December 12, 1898, the supreme court of the United States seems to have abandoned its former rulings, and to have adopted what Dillon announces as the only true rule upon principle. In that case the court said: "The particular question presented for consideration involves the validity of an ordinance of that village [Norwood], assessing upon appellees' land abutting on each side of the new street an amount covering, not simply a sum equal to that paid for the land taken for the street, but in addition the cost and expenses connected with the condemnation proceedings." And: "The present appeal

is prosecuted directly to this court, because the case involves the construction and application of the constitution of the United States." Under a statute of Ohio, the council was authorized to assess the cost and expenses of street improvement "by the front foot of the property bounding and abutting upon the improvement." Rev. St. § 2264. Under this statute the village passed an ordinance providing that all costs and expenses of the condemnation and opening proceedings should be assessed 'per foot front upon the property bounding and abutting on that part of Ivenho avenue as condemned and appropriated herein.'" The real question presented by the facts is thus stated by the court: "Does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?" In answering the question the court say: "The power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessment to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be

deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgement, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." After reviewing many authorities, and italicizing what Dillon affirms as the true rule, the court concludes: "It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost." And further: "As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot, and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The asssessment was in itself an illegal one, because it rested upon a basis that excluded any consid-

eration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one." Again: "The present case is one of illegal assessment under a rule or system which, as we have stated, violated the constitution, in that the entire cost of the street improvement was imposed upon the abutting property by the front foot, without any reference to special benefits." An assessment for such improvement, to be in conformity with the opinion, is thus stated: "That, while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessement must be measured or limited by the special benefits accruing to it,—that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation." The final judgment of the court follows: "The judgment of the circuit court must be affirmed, upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation."

Local Assessments—Frontage Rule—Constitutional Law.

While the facts in the Norwood-Baker Case are unusual and distinguishable from the facts in the case at bar, yet it cannot be successfully denied that the general doctrine laid down is to the effect that the imposition of assessments for local improvements per front foot, irrespective of the question of accruing benefits, is in violation of the fourteenth amendment to the federal constitution; and that the case has been so construed generally by the courts of the country, see Loeb *v.* Trustees (C. C.; Jan. 9, 1899) 91 Fed. 37, involving the validity of

assessments laid by a township upon abutting property for the improvement of a road; Fay *v.* City of Springfield (C. C.; May 9, 1899) 94 Fed. 409, street-paving assessments against abutters; Sears *v.* Commissioners (May 18, 1899) 173 Mass. 350, 53 N. E. 876, sewer assessments upon a particular class of property; Hutcheson *v.* Storrie (June 19, 1899) 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289, street-paving assessments upon abutting property; Schroder *v.* Overman (Ohio: Oct. 24, 1899) 55 N. E. 158, street-pavement and sewer assessments against abutters; Charles *v.* City of Marion (C. C.; Dec. 11, 1899) 98 Fed. 166, street-paving assessments against abutters.

The judgment of the federal supreme court defining the limits of legislative power, sanctioned by the federal constution, is the supreme law of the land. It commands state courts as well as state legislatures. The duty thus imposed is agreeable, as being in accord with our sense of just principles, and as furnishing the only reasonable foundation for the exercise of the taxing power in respect to special assessments.

Streets are public highways, which all inhabitants of the municipality have an equal right to use, and by the improvement of which all are in a measure benefited. There is much justice in holding that a sum equal to the special benefits —that is, such benefits as are not shared by the citizens generally—conferred upon the abutters may be exacted for application to the costs of the improvement; for, when the corporation takes only so much as it returns in the way of enhanced values and increased personal comfort, the property owner is not injured, but when he has thus contributed his special benefits as to the remainder of the costs he stands as any other citizen. This remainder represents the price to the public for its general benefits, and when exacted from the abutters is but the taxation of a class for public benefit, and clearly a taking of property for public use without just compensation.

We conclude, therefore, that the principles applicable to assessments for local improvements are these: The legislature may create, or authorize a municipality to create, a local taxing district for local improvement purposes, which includes part only of the property within the municipality. The legislature may declare conclusively that only the property within the taxing district shall be specially assessed on account of local improvement within that district. Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits. The taxing district, as a whole, may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property. The improvement, so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large, and such excess must be borne by the general treasury. Property owners affected by an improvement within a taxing district are entitled to a hearing on the question of special benefits.

Same—Taxing Districts—Constitutional Law.

Same—Same—Same.

Same—Same—Same.

Same—Same—Same.

Same—Same—Same—Rights of Property Owners.

It remains to be seen if the Barrett law denies any of these principles. Whether the answer shall be for the appellant or the appellee depends upon two considerations, namely: (1) Does the Barrett law require that the costs of street and alley improvements shall be assessed against abutting property by the front-foot rule, without regard to the question of resulting benefits? (2) Do the provisions of the Barrett law supply to affected property owners "due process of law," within the meaning of the state and federal constitutions?

In arriving at the true interpretation of the statute, it is useful for us to review the legislative and judicial history of the state and county prior to the enactment of the Barrett law, in 1889. Dillon and Cooley class Indiana as one of the majority states upholding the doctrine that it is competent for the legislature to conclusively declare that the total cost

of a local improvement shall be assessed equally against the frontage, and such classification was not without warrant. In 1852 the right to confer authority upon municipal officers to so provide for street and other improvements was first asserted by the legislature in a general law. Rev. St. 1852, p. 217. It was reasserted in 1857 (Acts 1857, p. 53), and again in 1865 (Acts 1865, Sp. Sess., p. 29), and again in 1867 (Acts 1867, p. 66), and again approved in 1881 (Rev. St. 1881, § 3163). The right to enforce such assessments was recognized by this court in 1861. City of Indianapolis *v.* Imberry, 17 Ind. 175, and in many subsequent decisions. The constitutionality of such legislation was never called in question until 1868, when it was assailed on the ground only that the same was in violation of the state constitution requiring the rate of assessment and taxation to be uniform and equal. Such legislation was then and subsequently upheld as against such objection. Const. art. 10, § 1; Goodrich *v.* Turnpike Co., 26 Ind. 119; Bright *v.* McCullough, 27 Ind. 223; Palmer *v.* Stumph, 29 Ind. 329; Law *v.* Turnpike Co., 30 Ind. 77. But the constitutional question of due process of law and the taking of property for public use without compensation in the making of local improvements, within the meaning of the fourteenth amendment to the federal constitution, seems never to have been previously considered by this court, so far as we have observed. Hence no ground exists to justify the insistence that the determination by this court, under former street-improvement laws, of the constitutional question now involved, has been carried into the enactment of the statute in controversy.

It should be noted that prior to 1889 no provision was found in any of the laws entitling property owners to a voice upon the necessity for the improvement, or to a hearing of any kind upon the acts of the assessing officers, or to be heard upon any subject touching the improvement, until after the issuance of a precept for the sale of their property for the payment of the assessment, and then only as to the regularity of the proceedings subsequent to the making of

the contract for the improvement. As the law had stood for 37 years, when the Barrett law came up for consideration in the assembly of 1889, municipal officers had the power, with a two-thirds vote of the council, to order an improvement, however costly and however unnecessary and oppressive, without regard to the wishes of the citizens, and proceed to charge the abutters with the total cost by the frontage rule, irrespective of any consideration of benefits, and thus, in some instances, impose upon the citizens an absolute confiscation of property without any form of hearing in its defense, further than to require it to be done orderly and accordingly to prescribed rule. For some reasons the people had become dissatisfied with the law as it existed upon the subject. In what respects may be best judged from the character of the changes that were made. It is evident that the discontent did not arise from the method of frontage assessments, as a rule; for that principle had been consistently maintained in every enactment since 1852, and was carried into the Barrett law. Besides, in most cases, the rule is as just and equitable as any that may be devised. In the light of 37 years' experience, however, it was doubtless manifest to the lawmakers that in some instances municipal officers, by reckless and inconsiderate acts, without testing public opinion, had involved citizens in heavy and unnecessary burdens by improvements, and that it was to them equally clear that all property bordering upon a municipal highway was not affected in the same way by an improvement of the latter; that in some cases the grade may be so raised or lowered as to most seriously impair the use and value of the property; in others, that some property may be situate upon a general level, highly improved, and in a business part of the city, while others upon the same street may be remote from business, lying low, and near a water course, and practically worthless for business or residential purposes; in others, some abutting lots may be 20 feet, and others 200 feet deep. It seems, therefore, reasonable to presume that the mischiefs

resulting from the acts of reckless officials, and the common, but exceptional, cases of injustice and hardship flowing from the uniform and rigid application of the front-foot rule, were brought to the attention of the legislature, and that their avoidance was a purpose entering into the structure of the new law. Quill *v.* City of Indianapolis, 124 Ind. 292, 295, 23 N. E. 788, 7 L. R. A. 681. This much is certain, that for reasons deemed sufficient new and important provisions were incorporated into the new law,—provisions contained in no previous law upon the subject.

The first of these is section 2, p. 231, Acts 1889 (section 4289, Burns' Rev. St. 1894), and is as follows: "Whenever cities or incorporated towns subject to the provisions of this act shall deem it necessary to construct any sewer, or make any of the alley or street improvements in this act mentioned, the council or board of trustees shall declare by resolution the necessity therefor, and shall state the kind, size, location and designate the terminal points thereof, and notice for ten days of the passage of such resolution shall be given for two weeks in some newspaper of general circulation published in such city or incorporated town, if any there be, and if there be not such paper, then in some such paper printed and published in the county in which such city or incorporated town is located. Said notice shall state the time and place, when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof."

It is argued that this section affords the property owner no remedy beyond the right to advise the council with respect to the necessity for the improvement; and so it has been held by this court. Quill *v.* City of Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681. But it does not follow that no benefit is to flow to the property owner from the observance of this provision. Municipal officers are elective, and, as a rule, in dealing with corporation affairs, will give respectful heed to the popular judgment of their constituents. This provision removes all power from the common council

to impose burdens upon private property unawares the owner. It requires public notice to be given of the character and location of the proposed improvement for 24 days from the first publication,—a length of time sufficient to develop public opinion advisely; and at a fixed time and place, and before making a contract, the council shall hear those along the line upon the subject of the improvement; and it may reasonably be expected that if the property owners shall be able to show that there exists no necessity for such improvement, or that it will cost more than the accruing benefits, well-meaning officers will be controlled by such showing and advice, as readily as by the positive mandate of a statute. It was not intended by this section to deprive the common council of the power of ordering the improvement irrespective of the advice of the property owners, but its purpose is to provide, in all cases, that they shall act advisedly and with deliberation.

The second and most important new provision is found in sections 6, 7, Acts 1889 (the latter section, as amended, Acts 1891, p. 324; Acts 1899, p. 631; sections 4293, 4294, Burns' Rev. St. 1894), which follow:

"When any such improvement has been made and completed according to the terms of the contract therefor made, the common council of such city, or the board of trustees of such town, shall cause a final estimate of the total cost thereof to be made by the city or town engineer, and the common council of such city, or the board of trustees of such town shall require said city or town engineer to report to the common council of such city or the board of trustees of such town the following facts touching such improvement: First. The total cost of said improvement. Second. The average cost per running front foot of the whole length of that part of the street or alley so improved. Third. The name of each property owner on that part of the street or alley so improved. Fourth. The number of front feet owned by the respective property owners on that part of said street so improved. Fifth. The amount of such cost for improvement due upon

each lot or parcel of ground bordering on said street or alley, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of ground respectively. Sixth. The full description, together with the owner's name, of each lot or parcel of ground bordering on said street so improved. Seventh. In the case of the construction of a sewer, a description of each lot or parcel of lot benefited thereby, together with the owner's name and the fair proportion of the cost of such sewer according to the benefits conferred thereby, that should be assessed against such lot or part of a lot."

"Upon the filing of the report provided for in the last preceding section, the common council of such city, or the board of trustees of such town, shall give two weeks' notice in a newspaper printed and published in such city or incorporated town, if any there be, and if there be no such paper, then in a newspaper printed and published in the county in which such city or incorporated town is located, of the time and place, when and where, a hearing can be had upon such report, before a committee to be appointed to consider such reports, and such committee shall make report to the common council of said city, or the board of trustees of such town, recommending the adoption or alteration of such report, and the common council of such city or the board of trustees of such town may adopt, alter or amend such report and the assessments therein. Any person feeling aggrieved by such report shall have the right to appear before such committees and the common council of such city or the board of trustees of such town, and make objections thereto, and shall be accorded a hearing thereon, and the common council of such city, or the board of trustees of such town, shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvement."

It will be noted that section 6 provides that, after completion of the work, the engineer shall report certain facts to

the council,—not make an assessment of the costs; that, when such report is lodged with the council, it shall give two weeks' public notice of a time and place when and where a hearing can be had upon the facts reported by the engineer, before a committee appointed by the council to consider such report, and such committee shall, after a consideration of the report, recommend to the council the adoption or alteration of the same. And any person feeling aggrieved by such report shall have the right to appear before the committee, and present objections thereto, and shall be accorded a hearing thereon, and the further right to carry his objections to the common council, where he shall also be accorded a hearing. After the hearings and objections are disposed of, the common council may adopt, alter, or amend the report and the assessments thereon, "and shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvement."

It is contended that the statute limits the hearing before the committee and common council to errors of the engineer in stating the facts required of him, and that the power of the council, with respect to the report, is exhausted when it has verified such facts. We are unable to approve such construction. Section 6 requires that the engineer shall report certain facts to the council; that is to say, report such facts correctly. Nothing short of a correct report is a compliance with the statute. We must view the subject as if the lawmakers assumed that the engineer would do his duty, and that, when he submitted his report to the council, it accurately stated the facts required of him. Besides, will it be seriously contended that if, by inadvertence, errors crept into the report, the engineer, or even the council, at any time before final action thereon, did not have full power to correct it? Ball *v.* Balfe, 41 Ind. 221, 225. What reason, then, could there be for the legislature to deem it expedient to provide express authority in the council to correct, or cause to be corrected, errors in a report where none were reasonably supposed to exist, and where the power of cor-

rection would exist by irresistible implication? We may not attribute insincerity and dissembling to the legislators. We must believe that they meant something by these provisions beyond that granted by the old law, or why change it? The old law had been found efficient, and authorized by the constitution.

In the search for legislative intent, "the court will look to each and every part of the statute; to the circumstances under which it was enacted; to the old law upon the subject, if any; to other statutes upon the subject, or relative subjects, whether in force or repealed; to contemporaneous legislative history; and to the evils and mischiefs to be remedied." Paving Co. *v.* Edgerton, 125 Ind. 455, 460, 25 N. E. 437; Reynolds *v.* Bowen, 138 Ind. 434, 449, 36 N. E. 756, 37 N. E. 962; Goodwin *v.* State, 142 Ind. 117, 121, 41 N. E. 359. The common council shall give two weeks' notice of a time and place when their committee shall consider the report and hear grievances. In drainage and other assessment proceedings, it is provided that the commissioners shall inquire into certain facts, assess benefits and damages, and "make report to the court, and the court shall fix a time for hearing the report," and, after 10 days' notice of the filing thereof, those affected by the report may appear and remonstrate. Sections 5624, 5625, Burns' Rev. St. 1894.

Is it even doubtful that the consideration of the report required of the committee, and the hearing they shall give thereon, relate to any other subject than the proposed assessments or allotments of the cost of the improvement? After such hearing and consideration, the committee is required to report their recommendations to the common council, and the council, being thus advised, and upon further hearing of objections, may adopt the report as made by the engineer, distributing the total cost equally per front foot, or it may alter the report and the assessments therein; and, when the conclusion of the council is reached, it shall assess against the several lots and parcels of ground the several amounts which

shall be assessed on account of such improvement. The mandate of the statute, following the hearings that the council shall assess the several amounts against the several parcels, clearly indicates the particular subject to be previously considered by the council and its committee. From the term "hearing" is necessarily implied the power to administer some adequate remedy. The council may alter the assessments; that is, as indicated by the engineer's report on the front-foot rule. "Alter" is to "make otherwise." Webst. Int. Dict.

From these considerations, we are unable to resist the conclusion that, upon the hearing provided in section 7, the common council have power to change assessments from the frontage rule in such cases as they may deem just. That the legislature may confer upon municipal officers the power to adjust special benefits accruing from such improvements to a fair and just basis is well settled (Garvin *v.* Daussman, 114 Ind. 429, 435, 16 N. E. 826; Kizer *v.* Town of Winchester, 141 Ind. 694, 696, 40 N. E. 265); and the speedy and ample remedy afforded by this view of the statute is consistent with the spirit of the act and the nature of such improvement, which public convenience requires to be accomplished in the shortest practical period. As said in the Daussman Case, 114 Ind. 436, 16 N. E. 830: "It is essential to the public good that the necessity for street and other public improvements, and the cost of making them, and such other proceedings as are necessary to secure the prompt execution of the work, be determined and taken in a comparatively summary way." An "assessment" is the "adjusting of the shares of a contribution by several towards a common beneficiary object, according to the benefit received." Bouv. Law Dict.; And. Law Dict. From the power to alter is necessarily implied the power to add to or diminish. The absence of an express rule for guidance in the exercise of the power to alter does not impair it. It is sufficient if the power to change the assessment from the frontage rule exists. "It is a well-affirmed principle that, when a power is con-

Same—Authority to Adjust Special Benefits—Constitutional Law.

ferred by a statute, everything necessary to carry out the purpose of the power conferred, and make it effectual and complete, will be implied." Conn *v.* Board, 151 Ind. 517, 525, 51 N. E. 1064; Suth. St. Const. §§ 340, 341. Such implied power, however, will not authorize the employment of means and methods which may spring from the whims and caprices of administrative officers, according to the varying circumstances, but will only permit the use of such reasonable, uniform, and consistent modes and measures as are calculated to accomplish the purpose in the spirit designed. How the power may be exercised in this instance must be determined from the spirit and scope of the whole act, of which said section 7 is a part, as aided by the spirit and principle running through other legislations upon the same and kindred subjects. *Id.* § 288. In an act relating to the opening and improvement of streets (section 3633, Burns' Rev. St. 1894; section 3170, Rev. St. 1881; section 3170, Horner's Rev. St.), commissioners are commanded to make assessments on the basis of actual benefits. The same rule is required in drainage and free gravel road proceedings (section 5658, Burns' Rev. St. 1894; section 4288, Rev. St. 1881; section 4288, Horner's Rev. St.; Acts 1869, p. 74); and this court has consistently held for 30 years that special benefits are the only foundation for special assessments (City of New Albany *v.* Cook, 29 Ind. 220; Ross. *v.* Stackhouse, 114 Ind. 200, 16 N. E. 501; Quill *v.* City of Indianapolis, 124 Ind. 292, 23 N. E. 789, 7 L. R. A. 681; Paving Co. *v.* Edgerton, 125 Ind. 455, 465, 25 N. E. 436).

The published notice calls attention of all persons affected that the report of the engineer is before the council for consideration, and that the same is subject to such alteration as the council may deem just in adjusting the several assessments to the basis of actual benefits, and all persons concerned are bound to know that the *prima facie* assessments against their property are liable to be increased as well as decreased. That this court, prior to 1889, supported the doctrine that the legislature had constitutional sanction to

declare, as matter of law, that the special benefits to a particular district, by an improvement, were equally received by bordering property, and equal to the total cost, had little force as an argument. The answer to it is that the injustice and hardship resulting from the doctrine were potential in securing legislative action for the amelioration of the rule. We think it evident that the assembly of 1889 determined upon a modification of the old rule, so far as it required an equal distribution of the cost of an improvement, on all bordering property, without regard to the question of actual benefits. Not that the rule offended either the federal or state constitution as then interpreted by the federal and state courts (for no question of that character had been raised in this state), but because it was required by the simplest principles of justice. That act of 1889 may be tested by the usual canons of construction, and if from these it appears that the assembly took cognizance of the mischiefs resulting from the old law, and provided a remedy in advance of constitutional requirement, the legislature is not to be discredited by the fact that the courts have come to restrict the constitutional limitations to the bounds set by the statute. The important inquiry is, is the statute, as enacted in 1889 and as it now stands, antagonistic to any of the principles of the federal constitution as now construed by the United States supreme court?

Section 3 provides: "In all contracts specified in the preceding section, the cost of any street or alley improvement shall be estimated [not assessed], according to the whole length of the street or alley or part thereof to be improved, per running foot, * * * and the city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley or part thereof to be improved, * * * shall be liable to the city for their proportion of the costs in the ratio of the front line of the lots owned by them, to the whole improved line for street and alley improvements, * * * and the city or incor-

porated town shall have a lien upon such lots or parts of lots respectively from the time such improvement is ordered for such costs of improvement, collectible as hereinafter provided. * * * Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street or alley crossings and may order that any part of the total cost of any of the improvements in this act mentioned shall be paid out of the general fund."

The gist of these provisions is that, in providing for the payment for an improvement, the expense of it shall be estimated —that is, calculated—by the running foot; the city or town shall be liable to the contractor for the full contract price, and to reimburse it the owners of lots shall be liable to the city or town for their legal proportion of the cost in the ratio of their several frontage to the whole frontage of the improvement, which liability shall constitute a lien upon abutting property in favor of the city or town from the time such improvement is ordered.

Three things may be noted in these provisions: (1) That the cost shall be estimated by the running foot, not so assessed; (2) That the liability shall relate to the frontage; and (3) that the liability and lien shall arise and attach at the time the improvement is ordered. There is nowhere to be found a mandate that the costs shall be assessed by the frontage rule, or that property shall ultimately be required to contribute equally per front foot. The measure of liability and lien here mentioned are only conjectured at most, since they arise before an ascertainment of the facts, by measurement, necessary to their definite determination. The provision can only mean that the liability and lien, when definitely ascertained by the report of the engineer, as required by section 6, as reviewed and adjudged by the common council, as required by section 7, shall relate back to the time of ordering the improvement.

If we read section 3 as providing a fixed rule of assessments, as contended, the effect is to render section 7 mean-

ingless and nugatory; for it clearly follows that, if the rule of assessments is unalterably fixed by section 3, the hearing provided for in section 7 is nothing more than a cunningly devised illusion, which expressly provides that the aggrieved property owners shall have the right to present their grievance to a tribunal that has no power to grant relief. This is mockery, pure and simple, and implies insincerity and dissimulation in the lawmakers, which we cannot indulge. On the other hand, if we read section 3 as providing a basis for assessments which shall be *prima facie* correct, and which shall be held to be the true and correct assessments until assailed by the property owner, and shown upon a hearing by a preponderance of proof or found to be unjust and altered and amended by the common council of its own motion, then we find sections 3, 6, and 7 in complete harmony, each effective and in accord with the other provisions of the act. The intention is to be ascertained by considering the entire statute; and we must proceed as we would with any other composition, construing it with reference to the leading idea and purpose of the whole instrument. The general intent is the polar star by which the meaning of any part is to be determined with a view to harmonizing the entire act. Suth. St. Const. § 239. We therefore conclude that section 3, Acts 1889 (section 4290, Burns' Rev. St. 1894), must be construed as providing a rule of *prima facie* assessments in street and alley improvements, which allotments by the city or town engineer, under section 6 of said act of 1889 (section 4293, Burns' Rev. St. 1894), are subject to review and alteration by the common council and board of trustees, under section 7 of said act of 1889, as amended (Acts 1891, p. 324; Acts 1899, p. 64; Burns' Rev. St. 1894, § 4294), upon the basis of actual special benefits received by the improvement; and that under said section 7 the common council of a city or board of trustees of an incorporated town have not only the power, but it is their imperative duty, to adjust the assessments for street and alley improvements, under said act, to conform to

Same—Frontage Rule—Construction of Statute.

the actual special benefits accruing to each of the abutting property owners.

The further question is propounded: If, in adjusting assessments to actual special benefits received, it shall be found that the total cost of the improvement exceeds the total sum of special benefits accruing therefrom, what provision is made for the excess of cost? It is quite clear that the common council or board of trustees have no power to impair the obligation of contracts, and that some provision must be made for full payment of the contract price for the improvement. Section 5 of said act (section 4292, Burns' Rev. St. 1894) reads as follows: "* * * The common council of such city or the board of trustees of such town, with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the first section of this act, and repairs of any kind of streets and alleys to be made in like manner, without such petition, and either charge and cause any or all of the expenses thereof to be assessed, as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or the board of trustees of such town to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town." Here is a new power granted the common council and board of trustees to order, by a two-thirds vote, any improvement as fully as they could do upon a petition, as provided by section 1; and, when the body chooses to exercise this power, it may elect between three schemes in providing payment for street and alley improvements. It may either charge the whole expense against the general revenues of the city or town, or it may charge a part against the general revenues and a part against the abutting property, or it may charge all the expense of such improvement against the abutting property, upon the presumption, which it may for the time indulge, that the aggregate special benefits accruing therefrom will be equal to the total expenses; but it must take notice, when it decides to charge the abutting property,

that the expenses shall be assessed "as hereinafter provided" in section 6 and 7, which, as we have seen, must be done upon the basis of actual special benefits received.

Section 3 provides that "the city or incorporated town shall be liable to the contractor for the contract price of said improvement," and when a city or town enters into a contract, under the scheme of requiring the abutters to contribute to the cost to the extent of their special benefits, the corporation is bound to know that if it shall be found, upon the hearing provided in section 7, that the accruing special benefits are inadequate to pay the expenses of the improvement, the deficit must be provided for from the general revenues of the city or town. The question of deficit cannot be determined until the common council has concluded its hearing and made the assessments. At this stage, the improvement has been completed, and the contractor entitled to his pay. It is then too late to halt or retreat. No course is then open to the corporation but to go forward, and put into exercise the power conferred by section 3, and order the deficit paid from the general treasury. The contingency of a deficit arises from the law, and enters into, and becomes a part of, the order for the improvement, and a part of the contract therefor, and is but a reasonable exercise of the continuing power to pay any part of the expenses from the general revenues when the fact arises that they cannot be fully met by the special benefits. The entering into a contract, under the scheme of requiring contribution from special benefits to the extent thereof, is an election between methods of payment, and, when once chosen and entered upon, the procedure thereunder, as fixed by the law, is as imperatively commanded as if no other existed. The insistence, therefore, that the law contains no mandate that the common council or board of trustees shall, in any event, pay any part of the expenses of such improvements from the general revenues, cannot be sustained.

We are aware that this court has held that, when the assessment scheme is pursued in making such improvements, the

city or town assumes no primary liability, except for street and alley crossings; and what we here hold is that, as to a deficit only, if any, in special benefits to meet the cost of an improvement, the city or town sustains the same primary obligation imposed upon it for street and alley crossings. There is language used in City of Terre Haute *v.* Mack, 139 Ind. 99, 38 N. E. 468, and perhaps in other cases, in this and the appellate court, not necessary to the decision of any question presented by the record, that appears in conflict with what is here decided, but, in so far as such language may so appear, it is disapproved. The canons of construction compel the interpretation which we have given this act, and, so construed, it is not obnoxious to any provisions of the state or federal constitution, either under the Norwood-Baker Case or the earlier decisions of the supreme court of the United States or of this state.

Same—Constitutionality of Statute.

It is proposed by the improvement which affects the appellant to reduce the roadway of the street from 70 to 56 feet in width, by an extension outward of the sidewalks from 15 to 22 feet. The sidewalks have heretofore, under corporation direction, been improved to a width of 15 feet from the lot lines, the first 10 feet paved with brick, and the balance to the curb graded and sodded; and it will be noted, from the facts stated on the first page of this opinion, that a part of the proposed improvement consists of filling the space between the brick sidewalk and the new curb with "good, rich dirt," to be smoothed to a grade with the brick sidewalk, and new curb and covered "with good, live, fresh sod." The point is made that, conceding the constitutionality of the Barrett law, the ordinance is void for want of power in the common council, under the statute, to assess the cost of filling with rich dirt and sodding against the abutters. The first section of the act (section 4288, Burns' Rev. St. 1894) provides that the common council "may have the sidewalk graded and paved, or the whole width of the street graded and paved," under the provisions of the act. It may well be doubted if

the authority here conferred can be extended to grading with a particular quality of earth, designed, not for the permanency of the improvement, but to produce a luxuriant vegetable growth. We think the words "grading and paving" are employed in the statute in the sense that the surface of the ground shall be made to conform to a regular line by cutting and filling with any sort of dirt suitable to the maintenance of the grade, and which may be most cheaply obtained, and smoothly covering the same with some hard substance, with the single view to permanency and easy travel for footmen and vehicles.

Same Ornamental Improvements—Authority of Common Council.

It is probably true, though we do not so decide, that the common council, in their general dominion over the streets, have implied power to construct lawns, and otherwise decorate those parts of the street not necessary to public travel, at the expense of the general treasury; but when it seeks to exercise the taxing power, and to levy upon a particular class the cost of an improvement purely ornamental, it must be able to point to some express provision of the statute conferring the right. No power to tax will arise by implication. Lemon v. Chunn, 1 Blackf. 337, 338; City of Lafayette v. Cox, 5 Ind. 38; Slessman v. Crozier, 80 Ind. 487; Gallup v. Schmidt (Ind. Sup.) 56 N. E. 443. The council has express authority of law to require the planting of shade trees at the expense of the abutters (clause 46, § 3541, Burns' Rev. St. 1894; clause 46, § 3106, Horner's Rev. St.); but it cannot be said that this right carries with it the power to construct lawns or other decorations in the streets, and to enforce the cost thereof against the abutters. The power is, at least, doubtful, "and any fair, reasonable doubt concerning the existence of the power is resolved by the court against the corporation, and the power denied." Dill. Mun. Corp. (4th Ed.) § 89, approved; City of Crawfordsville v. Braden, 130 Ind. 149, 152, 28 N. E. 849, 14 L. R. A. 268; Williams v. Davidson, 43 Tex. 33; City of Corwallis v. Carlile, 10 Or. 139; Kirkham v. Rus-

Same—Same—Same.

sell, 76 Va. 956. We therefore hold that the ordinance, so far as it provided for the grading with rich dirt and sodding as a part of the proposed improvement, was void, as being *ultra vires*, and that the appellant was entitled to an injunction against so much of said proposed improvement. Equity will enjoin the exercise of an unauthorized power. Sackett *v.* City of New Albany, 88 Ind. 473; Board *v.* Gillies, 138 Ind. 667, 673, 38 N. E. 40; Dill. Mun. Corp. (4th Ed.) § 914. If entitled to any part of the relief sought, the demurrer to the complaint should have been overruled. Judgment reversed, with instructions to overule the demurrer to the complaint.

Same—Same—Same—Validity of Ordinance—Right of Property Owner to Enjoin.

BAKER, J., dissents from so much of the opinion as affirms the constitutionality of the Barrett law.

BAKER, J. (dissenting). I regret my inability to agree with my Brethren in their construction of the Barrett law. In stating my reasons, with all due deference, I think it proper first to determine accurately the question presented for solution. The federal constitution is not what the citizen may read it to be, but is what the supreme court of the United States declares it to be. I concur in the statement that, prior to the Norwood-Baker decision, 172 U. S. 269, 19 Sup. Ct. 187, 42 L. Ed. 443, the method stated in Dill. Mun. Corp. (4th Ed.) § 752, was constitutional; that is, that the legislature, in its discretion, might declare as a matter of law that the whole cost of a street improvement and the special benefits to abutting property equaled each other, and that the cost should be apportioned according to frontage, and that the property owners were entitled to a hearing before a tribunal authorized to review the assessment and see that it justly conformed to the frontage basis. For brevity, I shall call this the "old" constitution. I concur in the statement that, since the Norwood-Baker decision, the method stated in section 752 of Dillon is unconstitutional, and that nothing short of the method stated in section 761 of Dillon is constitutional; that is, that the legislature must

provide a method by which the special benefits to contributing property shall be determined as a question of fact, and that the excess of cost above the sum of special benefits is a general benefit, to be paid for from the general treasury, and that property owners are entitled to a hearing before a tribunal authorized to review the assessment, and see that it justly conforms to the basis of benefits in fact received. For brevity, I shall call this the "new" constitution. The textbooks and reports are full of the general statement that "the only basis for special assessments is special benefits." Concerning this proposition there has never been any disagreement, so far as I have been able to learn. But from this common starting point two very dissimilar lines of thought have been followed. In one it was said: "Special benefits are the only legitimate basis for special assessments, but the legislature may declare, as a matter of law, that the property owner's special benefits are exactly equal to his special assessment by frontage." In the other it was said: "Special benefits are the only legitimate basis for special assessments, but the property owner may not be specially assessed beyond his special benefits found as a matter of fact." So, finding in reported cases the expression that special benefits are the only legitimate basis for special assessments does not of itself show which theory a court has adopted. It is hardly conceivable that a court would be following out the two theories at the same time. They seem as far apart as the poles, as essentially different as a question of law is from a question of fact. A legislative act, it seems to me, must have some consistent theory underlying it. It cannot well be two different things at once. The legislature must have intended the one or the other,—not both. And, though it is within the range of possibilites that the legislature in 1889 might have framed a law which would meet the requirements of the "new" constitution of 1898 and which would be permissible under the "old," the question is, which theory was it that the legislature intended to conform to in the Barrett law? Is it likely that, by prescience or by

chance, the legislature hit upon the requirements of the "new" constitution that were not in the "old"? Or, on the contrary, did the legislature intend to carry out the same policy, sanctioned by the judiciary, that had then been in operation for nearly 40 years, with the addition of the bond feature?

Before proceeding with the question, it may be well to notice two lines of argument advanced by counsel for appellee, to which my Brethren, perhaps unconsciously, may have accorded some weight. One is that this court must presume that the legislature intended its act to conform to the constitution, and therefore this court, by intendment, should supply to the act whatever is needed to make it constitutional. The other is that the supreme court of the United States will follow any line of decision that this court may adopt. Whether or not this last statement is true is not within the province of this court to decide; and whether, if that were true, it is an argument addressed to the reason, or an appeal to what counsel may believe to be the prepossessions, of this court, is not worth while to consider. But counsel's first contention is of great importance. If the contention were correct, then this court and every court has committed a grievous wrong against an independent and co-ordinate branch of the government every time a statute has been held to be unconstitutional. But it seems to me such a process is not judicial construction. Judicial construction is not an unbridled force, operating this way in one case and that way in another, according to caprice, or what courts may think would be good legislative judgment. The function of judicial construction is, not to hold statutes constitutional, but to determine the meaning of statutes. If it is found that the legislature has acted within the scope of its powers, courts should let the act alone, whether they deem it wise or not. If it is found that the legislature has usurped power, and invaded the reversed rights of the people, it should be the duty of the courts rigorously and jealously to uphold the rights of the people, even if they think the legislature ought to have the power it

attempted to exercise. The first business of the courts is to ascertain judicially the meaning of the statute. Whether the statute is constitutional or unconstitutional cannot be determined until the meaning of the statute is first determined; and that meaning should be determined according to rules of law that the courts should uniformly follow. If courts recognize no rules in declaring the legislative intent, or disregard the lawful order of applying recognized rules, the people, the bar, and the inferior tribunals would have no means by which to make even a fair guess at what would finally be declared to be the law. If there is no law to control courts' interpretation of law, as well might there be no law at all. "*Non licet judicibus de legibus judicare, sed secundum ipsas.*" But, if counsel were correct in the contention that the court should first examine the constitution, and then, by construction, mold the statute to fit it, the argument, it seems to me, should operate against appellee, and not in its favor, for the constitution that the members of the legislature of 1889 had sworn to support was the "old" constitution. They may have had the prevision to see that a "new" one was coming, but they were not bound to frame their laws according to its fashion. Yet the impression remains with me that my Brethren have first laid out the new pattern, and then cut the old material to fit it.

The Barrett law is too lengthy to set out here in full. But, omitting such portions as are exhibited in the majority opinion, I shall endeavor to give the framework of the statute. The first section provides for the beginning of street improvement proceedings by the petition of property owners. The second section authorizes the common council to declare by ordinance the necessity for street improvements, and directs notice of the passage of such an ordinance to be given by publication. "Said notices shall state the time and place when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof." This section does not purport to relate to the method of assessment, or to give property

owners a hearing on any subject except the necessity of the proposed improvement; and, as the power to decide is left within the unqualified discretion of the council, the objections which property owners could make on the question of the necessity of the improvement would necessarily be advisory only. Accordingly, it is decided by this court that the common council may enter an order for the construction of the improvement before giving notice of the resolution of necessity. Paving Co. *v.* Edgerton, 125 Ind. 455, 462, 25 N. E. 436. This being so, I am unable to perceive how section 2 has any application to the construction of the sections that point out the procedure after the construction of the work has been determined upon. The third section, omitting the part in reference to sewers, declares that "the cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved, per running foot, * * * and the city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley, or the part thereof to be improved. * * * shall be liable to the city for their proportion of the cost in the ratio of the front line of their lots owned by them to the whole improved line for street and alley improvements, * * * and the city or incorporated town shall have a lien upon such lots or parts of lots, respectively, from the time such improvement is ordered, for such costs of improvement, collectible as hereinafter provided, * * * and the owner of such unplatted lands bordering on such street or alley or part thereof to be improved shall be liable to the contractor for their proportion of the cost in the ratio of the front lines of such unplatted lands owned by them to the whole improved line; and in making the assessment against such owners for the improvement of such lots or parts of lots and unplatted lands [the cost] shall be assessed upon the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the city

or incorporated town and the contractor shall have a lien thereon for the value of such improvement. * * * Any mistake in the description of the property or in the name of the owner shall not vitiate the lien of such assessment. Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings, and may order that any part of the total cost of any of the improvements in this act mentioned shall be paid out of the general fund." The fourth section provides for an allowance to the owner of any lot who, before the contract is let, has made any improvement in front of his lot in accordance with the general plan of improvement for his street, and provides for taking security from the contractor. The fifth section: "When any such contract shall be made, or shall have been heretofore made, and shall have been in progress of fulfillment, the common council * * * shall have power to cause estimates to be made from time of time of the amount of work done by the contractor, and to cause the same to be paid out of the treasury, deducting a reasonable amouut of percentage to secure the completion of the contract until the whole shall be finished, and to prescribe the time in which the whole shall be completed, and such estimates shall be a lien upon the several parcels of ground upon which they are assessed to the same extent that taxes are a lien, and shall have the same preferences over other demands, and such liens shall be in favor of the city or incorporated town and the owners of the certificates or bonds hereinafter mentioned, to secure the city or incorporated town and such owners the reimbursement for such cost of improvement hereinafter provided for. The common council of such city or the board of trustees of such town, with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the first section of this act, and repairs of any kinds of streets and alleys to be made in like manner, without such petition, and either charge and cause any or all of the expenses thereof to be assessed and collected,

as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or the board of trustees of such town, to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town." The sixth and seventh sections are set out in the majority opinion. The eighth section authorizes the issuance of improvement bonds, in anticipation of the collection of the assessments, for the payment of which bonds the lot owners provide the money in annual installments, and commands that, after the assessment has been confirmed by the common council, "no suit shall lie to restrain or enjoin the collection of such assessment, and the validity of such assessments shall not be questioned, and such bonds, when issued, shall transfer to the owner thereof all the right and interest of such city or incorporated town in and to such assessments and the liens thereby created, with full power to enforce the collection thereof by foreclosure or otherwise, under any of the provisions of this act." The ninth section provides for the foreclosure of assessment liens, and transfers the city's interest in the liens to the holders of the bonds. The tenth section authorizes the collection of assessments by the city treasurer by sale upon precept, and allows the lot owners the right of appeal to the circuit court of the county, but "in case the court and jury shall find, upon trial, that the proceedings of said officers subsequent to said order directing the work to be done are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct the property to be sold and conveyed by the sheriff thereof as the said treasurer is hereinafter directed to sell and convey property liable to street improvements." In regard to section 10, it is evident that, under any construction of section 7, the appeal from the precept has become nugatory; for, the assessments having been made conclusive on the hearing before the council, the prop-

erty owner may not again contest what has been finally adjudicated. But section 10 is important in considering the changes made in street improvement proceedings by the Barrett law.

Now, the question being under which of the two inconsistent methods of laying assessments the legislature intended to act,—whether under the old constitution, according to special benefits declared as a matter of law, or under the new, according to special benefits, to be determined by the assessing officers as a matter of fact,—the answer should require an examination of the whole statute in the light of the circumstances surrounding the legislators in 1889, in order to determine the entire scope and manifest intent of the act. And the first of these circumstances is the attitude of this court. For nearly 40 years prior to 1889 street improvements were made in this state under laws that declared that the special benefits and the assessments by frontage for the entire cost, except for street and alley crossings, equaled each other; and this court uniformly held that such laws were in harmony with the old constitution. In Snyder *v.* Town of Rockport (May term, 1855) 6 Ind. 237, an act was assumed and declared to be constitutional that directed the town board, on petition of two-thirds of the owners of abutting property, to assess the whole cost upon all abutting property and to apportion the cost according to the last assessed valuation of such property. In Goodrich *v.* Turnpike Co. (May term, 1866) 26 Ind. 119, the constitutionality of a local assessment act, wherein the legislature had fixed the "special benefits" arbitrarily as a matter of law, was under consideration, and this court, among other things, said: "It is claimed that the assessment authorized by this statute is not a tax, not a burden or charge imposed by the legislative power of the state upon persons or property to raise money for public purposes, but the exercise of the power of eminent domain, in taking private property for public use 'without just compensation.' There is a manifest distinction between the taxing power and that of eminent domain. Both, in effect, appropriate private property to public uses.

They differ only in degree. Taxation exacts money from individuals as their share of the public burdens, and the taxpayer, according to the theory of our system, receives a just compensation in the benefits conferred by the government in the proper application of the tax. When, however, property is appropriated by virtue of the right of eminent domain, it is taken, not as the owner's share of a public burden, but as so much more than his share. Many of our public improvements are local in their character, and confer special benefits on those in their immediate vicinity. By a long line of decisions of this court, these benefits may be set off against damages sustained by the appropriation of private property for public use in the construction of such works. In the case in judgment the legislature has determined—and this matter is within its power—that this is a proper subject for taxation, and that the burden imposed is the just share of each person embraced within the provisions of the act." In Palmer *v.* Stumph (May term, 1868) 29 Ind. 329, it was said: "By this act the rate is the same upon every one within reach of the assessment; that is, the exact benefit each may receive from the improvement of the street. The legislature have adopted this method of reaching that result. It is certainly reasonable to suppose that, as a rule, property along the line of a street improved will be equally benefited; that, as a rule, the property fronting upon a street, foot by foot, will be of equal value, and should, therefore, be equally assessed." In Ray *v.* City of Jeffersonville (May term, 1883) 90 Ind. 567, an assessment under the street improvement law of 1881 was attacked on the ground that the act was in violation of section 21, art. 1, of our constitution, which provides that "no man's property shall be taken by law without just compensation"; and the court held the act valid as against that objection. This court, through MITCHELL, C. J., in Ross *v.* Stackhouse (Nov. term, 1887) 114 Ind. 200, 16 N. E. 501, declared: "Special assessments for street and other similar improvements are upheld upon the theory that each lot or

tract of land assessed is benefited in a special and peculiar manner in a sum equal to the amount estimated or assessed against it." Through the same judge, the court, in Garvin *v.* Daussman (May 8, 1888) 114 Ind. 429, 16 N. E. 826, in speaking of the kind of notice and hearing that was thought to satisfy all constitutional requirements, said: "In the imposition of poll or occupation taxes, where a certain sum is assessed against each individual exercising a given avocation, or according to his age, without regard to actual benefits, the necessity of notice and a hearing is reduced to a minimum. To a measurable extent, the same principle is involved when the cost of an improvement is, as by law in proper cases it may be, apportioned by mere mathematical calculation, according to a certain rate per front foot. * * * The principle which underlies and upholds special assessments, such as that involved in the present case, is that the lands assessed are enhanced in value to an amount equal to the cost of the improvement, which is to be apportioned among those specially benefited in the manner prescribed by law. * * * It is essential to the public good that the necessity for street and other public improvements, and the cost of making them, and such other proceedings as are necessary to insure the prompt execution of the work, be determined and taken in a comparatively summary way. * * * If, therefore, the law provides for giving notice, and for a method whereby the property owner may ultimately challenge the correctness of the assessment made against his property, in respect to whether it was made in good faith, without intervening mistake or error, and according to the method and under the safeguards provided by the law,—the constitutional provision is deemed to be satisfied."

Taking the foregoing as a fair illustration of the judicial history of the question down to 1889, I cannot agree in the statement that the constitutionality of the front-foot method had been considered only in reference to the provision requiring uniformity and equality in taxation, and never in reference to "just compensation" and "due process of law";

and I am unable to reconcile such a contention with the admission that Dillon and Cooley were not without warrant in classing Indiana "as one of the majority states upholding the doctrine that is competent for the legislature conclusively to declare that the total cost of a local improvement shall be assessed equally against the frontage." The legislature of 1889 not only knew this judicial history, but also were aware that it was occasioned by a uniform and consistent course of legislation since 1852. Prior to 1889 the street improvement laws had been changed many times, and yet it is agreed that the underlying plan remained the same. In 1889 certain changes were made; and my Brethren, if I understand them, state that the legislature intended to abandon the whole theory of local assessments under the "old" constitution, and to adopt the theory of the "new." And this on account of the people's dissatisfaction with the law. But it is said that "it is evident that the discontent did not arise from the method of frontage assessments as a rule, for that principle had been consistently maintained in every enactment since 1852, and was carried into the Barrett law." The last declaration of this court on the subject of street improvements prior to the meeting of the legislature in January, 1889, was made in Garvin v. Daussman (May, 1888) 114 Ind. 429, 16 N. E. 826. In that case, as in some earlier ones, the constitutionality of the arbitrary front-foot method was upheld, not only in respect to "uniform and equal taxation," but also in respect to "just compensation" and "due process of law"; and the court then advised the legislature that "the determination of the common council * * * may be made conclusive. * * * It is essential to the public good that the necessity for street and other public improvements, and the cost of making them, and such other proceedings as are necessary to insure the prompt execution of the work, be determined and taken in a comparatively summary way." In making up the Barrett law, the legislature did not strike out into new fields; but they took, as the foundation to work upon, the old street im-

provement statutes of this state, which are confessedly based upon the arbitrary front-foot method; and adopted from other states certain elements that stood as component parts of the arbitrary front-foot method. Compare Bates' Ann. St. Ohio 1899, §§ 2293a, 1–9, and sections 2293b–2293d. Also laws N. Y. 1870, c. 619; Laws N. Y. 1881, c. 689; Laws N. Y. 1884, c. 510; Laws N. Y. 1885, cc. 396, 406; Laws N. Y. 1893, c. 550; Laws N. Y. 1895, c. 816; and Spencer *v.* Merchant, 100 N. Y. 585, 3 N. E. 682; Jones *v.* Town of Tonawanda, 158 N. Y. 438, 53 N. E. 280; Lyon *v.* Town of Tonawanda (C. C.) 98 Fed. 361. The new features that were not in our former statutes are the provisions for the resolution of necessity, for the issuance of bonds and the foreclosure of the liens represented thereby, for the laying of the assessments by the city engineer, and for the substitution of the common council for the circuit court as the tribunal whose judgment, after a "hearing," makes the assessments conclusive. As these features are well adapted to fit into the scheme of laying street assessments by the arbitrary front-foot method, and as such was their place in the legislative plans of Ohio and New York, and perhaps other states, it strikes me as a somewhat violent assumption to say that the legislature of 1889 must have intended, by the introduction of these provisions, to grant the property owners rights beyond those given by the "old" constitution that was then in force, and to afford them the protection guarantied by the "new" constitution of 1898. The proper assumption would be that the legislature did not intend to depart from a long-settled policy, or to have the basis of assessment which was brought forward from our former statutes, viewed in any other light than that of its settled construction. The new provisions, except section 6, do not purport to fix any rule for laying the assessments. Section 6 expressly makes frontage the basis for street assessments. So it is found that in the only new section which speaks of the method of assessment the same plan is apparent that inheres in the old matter which was re-enacted. And in no

other way could section 6 have been harmonized with the former laws which were used as the foundation of the new. Yet on the word "hearing" in section 7 is hung a construction which, as it seems to me, conflicts not only with the former laws, but also with the concurrently new matter in section 6. My Brethren seem to have overlooked the consideration that in enacting the Barrett law the legislature may have found that the then existing statutes, which permitted the property owners separately and one at a time to contest in the circuit court the correctness of their assessments, did not afford a satisfactory basis for the issuance of bonds, and that the substitution therefor of a "hearing" before the common council, at which all objections could be disposed of together, furnished "a comparatively summary way" of rendering the assessments conclusive, as suggested in Garvin *v.* Daussman, *supra.*

It seems to me that my Brethren have acted upon the plan of first adopting a construction of section 7, and then construing the rest of the act (so far as it is set forth by them) in a way to conform thereto. I think this is not a proper method of interpretation; and I cannot, under the rules of construction as I understand them, find the meaning in section 7 that has been given to it. The language of the section furnishes no foundation for the construction adopted. It makes no allusion to special benefits. It fails to command the city to refrain from assessing upon the abutting lot an amount in excess of the special benefits actually received by it, and to refrain from assessing upon the property in the taxing district an amount in excess of the sum total of the special benefits actually received by the several parcels of contributing property. It fails to command the city to pay from the general treasury the excess of the cost above the total special benefits,—the part that benefits only the municipality at large. Benefits and damages are the varying degrees above and below zero on the compensation scale. If a lot owner's special benefits were below zero, from what source, and by what method, is he to make even? The section fails

to provide. These omitted matters might have been fully and explicitly supplied by the legislature by tacking them onto the word "hearing," but it did not do so. My Brethren say that "from the term 'hearing' is necessarily implied the power to administer some adequate remedy." That remedy, they say, must be a determination of special benefits actually received, for otherwise the legislators are accused of insincerity, dissimulation, and mockery. The argument seems to me a plain begging of the question. The question is, did the legislature intend to provide the "hearing" required by the "old" constitution, then in force, or the "hearing" required by the "new" constitution of 1898? The argument seems to assume that in 1889 no "hearing" was a "hearing" unless it was for the purpose of determining benefits actually received as a matter of fact. Although I agree in the statement that well-disposed taxing officers would remedy their omissions and mistakes, if they noticed or were informed of them, without any "hearing," yet I say that the legislature never had the power to frame a law that shut off the property owner on the presumption that the assessing officers would make no omissions or mistakes. In all valid taxation, three things have ever been required: First. A law directing the assessing officers how to proceed. The authority to tax is exclusively a legislative power. "This is manifest from the slightest consideration of what taxation is. It is the making of rules and regulations under which the necessary revenues for all needs of government are to be apportioned among the people and collected from them." Cooley, Tax'n (2d. Ed.) 41. Second. An assessment by the proper administrative officials, which must be made in substantial conformity to the method prescribed by the law; for the expression of one method is the exclusion of all others. Third. An opportunity for the property owner to have a "hearing" before some tribunal with judicial powers on the question whether or not the assessing officers have substantially complied with the method prescribed by the law. So the word "hearing" does not necessarily imply a hearing on special benefits

as a matter of fact; for, on the question of the correctness of special assessments for special benefits declared as a matter of law, the property owner was entitled to a "hearing," and it would have been oppression and confiscation to have denied it to him. The city is the actor in prosecuting the proceedings that result in a judgment making the assessments conclusive upon the lands of abutting proprietors. The engineer files his report, assessing each piece of contributing property a certain sum as he has computed it according to the commands of section 6. The hearing provided for in section 7 is, according to the language of the act, a hearing upon the report of the engineer and the assessments therein. It is axiomatic that in all hearings the tribunal must determine the case upon the charge filed against the defendant. This is true, not only in all cases before regularly ordained courts, but also in all special proceedings before special tribunals. In proceedings before city commissioners for the opening and vacation of streets) section 3166 *et seq.*, Rev. St. 1881; section 3166 *et seq.*, Horner's Rev. St. 1897; section 3629 *et seq.*, Burns' Rev. St. 1894), before circuit courts and before boards of county commissioners for the establishment of public drains (chapter 49, Rev. St. 1881; chapter 49, Horner's Rev. St. 1897; chapter 49, Burns' Rev. St. 1894), before boards of county commissioners in the various proceedings relating to free gravel roads (chapter 70, Rev. St. 1881; chapter 70, Horner's Rev. St. 1897; chapter 76, Burns' Rev. St. 1894), the landowners are afforded a hearing on the question of special benefits, not because they are offered a hearing, but because the charge upon which the hearing is had is that their particular lands are severally specially benefited. In all these cases, the question for the tribunal to determine on the hearing is whether the engineer (or viewers, or corresponding officials, who formulate the charge against the property owners) has fully, impartially, and correctly performed the duties laid upon him by the statute. If he has, judgment confirming his action is rendered; if he has not,

the tribunal alters or amends, or requires him to alter or amend, his charge to conform to what it should have been in the first place if he had complied with his duties under the statute, and then renders judgment on the charge. This principle has been fully recognized in the street improvement cases of Garvin *v.* Daussman, 114 Ind. 429, 16 N. E. 826, and City of Terre Haute *v.* Mack, 139 Ind. 99, 38 N. E. 468. In Hutcheson *v.* Storrie (June 19, 1899) 51 S. W. 852, 45 L. R. A. 289, the supreme court of Texas had before it a law that is exactly the same in essentials as the Barrett law. After the engineer files his report of the total cost, etc., and of the assessment upon each lot by frontage, the city council gives notice by publication of a hearing, when the property owners may "object to any such acts and proceedings, and show wherein they have been or may be wronged or injured thereby, and asked for a revision or correction of the same." The city council cannot make the final assessments until all objections have been heard and determined. It will be observed that the Texan property owners were given an opportunity to "show wherein they have been or may be wronged or injured" by the front-foot assessment. This is certainly as broad as the right to "make objection" to the report and the assessments therein. And the court said: "The foregoing provision of the charter authorizes the property owner to call upon the city council to revise or correct errors committed in the proceedings had in assessing the cost of improvement against his property, but it does not empower the council to do anything that it or its officers could not have done in the first instance. The words 'revision' and 'correction' mean that the council may be called upon to review that which had been done, and to make the proceedings conform to the law. Vinsant *v.* Knox, 27 Ark. 272. The city council, and the officers acting under the authority of the charter of the city of Houston, having no power, in the first instance, to consider the question of benefits in fixing the amount to be charged against Mrs. Hutcheson's property, a revision and correction of the acts done

could not give relief against the wrong complained of. * * * The claim that, upon petition of Mrs. Hutcheson, the council could have afforded relief from the unlawful exaction, is wholly unsupported by the terms of the law, and is in direct conflict with many of its provisions. The wrong did not consist in a failure to follow the directions of the law, but in obeying its unconstitutional requirements." So, on the hearing mentioned in section 7 of the Barrett law, the inquiry must be confined to the question whether or not the assessment reported by the engineer has been made as it ought to have been made in the first instance,—that is, in conformity to the terms of the law prescribing his duties,—unless that hearing, of all the hearings in the world, is to be made an exception to the universal rule that a tribunal must determine a case on the charge filed against the defendant, and is not at liberty to discard that charge, and reach out and draw in some other from undefined sources and by undefined methods. On the "hearing" the common council "may adopt, alter, or amend such report, and the assessments therein." It is true that "alter" means "to make otherwise." But it does not follow that the report and the assessments therein cannot be made otherwise than the engineer made them, except by abandoning the method of testing the assessments by the standard of special benefits declared as a matter of law, and following the method of testing the assessments by the standard of special benefits actually received determined as a matter of fact. If the engineer made any mistakes in following out the front-foot method prescribed for him, his report, and the assessments therein, would be made otherwise by correcting the errors. But "alter" is used in connection with other words. The council "may amend" the report and the assessments therein. "Amendment" is usually understood in law to mean the supplying of deficiencies. If the engineer made any omissions of property or other material matter, his report, and the assessments therein, would be amended by supplying the deficiencies. The council "may adopt" the

report and the assessments therein. If the engineer, as the assessing officer, has made no mistakes nor omissions in laying the assessments in his report, surely the council, as a reviewing tribunal, should be permitted to confirm the assessments. In taking the actual language of the clause, something more than the word "alter" should be considered. For example, it makes a difference whether the auxiliary verb "may" or "shall" is connected with "alter." Standing alone, "alter" can be given the broadest definition to be found in the dictionaries; and, if the auxiliary verb and the object are to be assumed, and not taken from the actual language of the clause itself, it is possible, of course, to say that the common council "shall alter the basis of the assessments in the engineer's report." But the actual language is that the council may adopt, alter, or amend the engineer's report and the assessments therein. The method on which the engineer's report and the assessments therein are based has been continuously asserted throughout the preceding sections. The canons of interpretation require that general words be limited to the sense of the context. "Not only are words and provisions modified to harmonize with the leading and controlling purpose or intention of an act, but also by comparison of one subordinate part with another; that is to say, the sense of particular words or phrases may be greatly influenced by the context, or their association with other words or clauses." Suth. St. Const. § 262. "General words or clauses may be restricted to effectuate the intention, or to harmonize them with other expressed provisions. Where general language, construed in a broad sense, would lead to absurdity, it may be restrained. The particular inquiry is, not what is the abstract force of the words, or what they may comprehend, but in what sense they were intended to be used as they are found in the act." *Id.* § 246.

To insert into the seventh section the elements that the legislature failed to include is, I think, not only violative of the plain language of that section, but is destructive of other

parts of the act. The primary rule of construction is to take the language of the legislature in question according to the plain and ordinary meaning of the words, without adding to or taking therefrom, and, if the language so taken does not create an ambiguity, to accept it as declaratory of the legislative intent. But, if there were an ambiguity, then the next rule of construction should require the court so to resolve the ambiguity as to give effect and purpose and meaning to the other parts of the act. If the ambiguity (supposed, for the sake of argument) were resolved in favor of the idea that the council, on the hearing, is required to determine the assessments on the basis of special benefits actually received, then the sixth section is deleted from the act, and the legislature is convicted of the folly of having provided elaborately and explicitly for a method of assessing upon each front foot throughout the improvement an equal sum (a method that necessarily excludes the consideration of special benefits actually received), and then declaring that on the hearing the council, not may, but shall, disregard and throw aside all that has been done relating to assessments, and begin *de novo*, and make the assessments by the method of determining the special benefits actually received. My Brethren seek to save some purpose and meaning in section 6 by holding, as I understand them, that the engineer does not make the assessments, but simply reports certain facts for the enlightenment of the council when that body enters upon the making of the assessments according to special benefits actually received. If this were true, section 6 would nevertheless accuse the legislature of dealing in futilities. How would the council, when that body purposes to enter upon the making of the assessments according to special benefits actually received, be enlightened by being informed of the total cost of the improvement? The average cost per front foot? The name of each property owner? The number of front feet owned by each? The amount due upon each lot, ascertained and fixed by multiplying the cost per front foot by the number of front feet of each lot? The

legal description of each lot? How would these items afford the council any information on those matters on account of which my Brethren say that special benefits actually received should be considered, namely, that it is "clear that all property bordering upon a municipal highway is not affected in the same way by an improvement of the latter; that in some cases the grade may be so raised or lowered as to impair most seriously the use and value of the property; in others, that some property may be situate upon a general level, highly improved, and in a business part of the city, while others upon the same street may be remote from business, lying low, and near a water course, and practically worthless for business or residential purposes; in others, some abutting lots may be 20 feet and others 200 feet deep"? But it is not true that the engineer simply reports certain facts and makes no assessments. He is required to ascertain and fix the amount due upon each lot by multiplying the average cost per front foot by the number of front feet of each lot. This is an assessment, as will hereinafter more fully be shown. It is sufficient for the present to point out that the legislature has in express words defined the engineer's ascertainment and fixing of the amounts due upon the several lots as "assessments." The legislature says that the matter in review before the council as a tribunal is the engineer's report and the assessments therein. And the matters other than the assessments, in the engineer's report, are material only on the theory that the property owners are afforded a "hearing" to challenge the correctness of the assessments, as "hearing" was defined in Garvin *v.* Daussman, 114 Ind. 439, 16 N. E. 826. It is true that, if a property owner's assessment were made on the basis of special benefits actually received, it could be figured out that the assessment amounted to so much per front foot,—$4.98 in one case and $1.30 in another. But it would have been just as reasonable for the legislature to require the engineer to report the number of persons in each property owner's fam-

ily; for, in the same way, it could be figured out that the assessment amounted to so much per head.

To insert into the seventh section the elements that the legislature failed to include would also destroy the fifth section of the act. That section empowers the council to pay the contractor from time to time during the progress of the work. Such payments are made out of the treasury, and are declared to be liens upon the abutting property. The city incurs no personal liability to the contractor, but acts merely as an instrumentality in collecting money for the contractor from the property owners. Quill *v.* City of Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681; Spidell *v.* Johnson, 128 Ind. 235, 25 N. E. 889. The plain meaning of the section is that, if the city shall advance money from the treasury to the contractor, the city shall have the absolute right to reimbursement from the property owners by means of the liens that, by this fifth section, are put upon the abutting property. If the city, under section 5, should advance to the contractor 90 per centum, say, of the cost, and if, under section 7, as my Brethern construe it, the city must limit the assessment against each parcel to an amount not exceeding the special benefits actually received by it, 50 per centum, say, of the cost, then the plain meaning of section 5 is utterly destroyed, and the city would be left with a loss of 40 per centum, say, of the cost, although the city had begun and carried forward the improvement under a resolution declaring that all of the cost, except for street and alley crossings, should be borne by the abutting property. If city officials had understood this necessary result of the construction contended for in this and other cases pending in this court, they might not have been so ready to deprive themselves of so much cash or debt-incurring margin to use for other purposes.

To insert into the seventh section the elements the legislature failed to include would also destroy the third section of the act. This section provides the fund for paying the contractor. As soon as the work is determined upon, the council makes a contract with the best bidder. The contractor gives

a bond for the prompt and faithful performance of the work. The contract is, of course, binding upon him, and he must execute it, or be liable on his bond. He enters into this binding contract on the faith of a positive legislative declaration: "The city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley or the part thereof to be improved shall be liable to the city for their proportion of the costs in the ratio of the front line of their lots owned by them to the whole improved line for street or alley improvements, and the city or incorporated town shall have a lien upon such lots or parts of lots, respectively, from the time such improvement is ordered, for such cost of improvement, * * * [which] shall be assessed upon the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement." As already stated, the city is not personally liable to the contractor. If the city has advanced money, it has the lien by which to secure reimbursement. If the contractor receives his contract price in improvement certificates or bonds, he has the lien by which to collect the contract price of his labor and materials. This section also says that the city "shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings." The plain meaning of section 3 is that, unless the city voluntarily assumes in advance to pay some definite percentage of the total cost, the city shall pay for street and alley crossings, and the property owners shall pay for the rest of the improvement; and that, if the city assumes a certain percentage, the residue of the total cost, except for street and alley crossings, which must be paid for by the city, is to be borne by the property owners. By the implied power that my Brethren find in section 7, this meaning is destroyed. If the assessments are to be measured by the actual benefits which the property own-

ers receive from the improvement, it is evident that the improvement as a whole must be considered. The question would be, how much special benefit does each lot actually receive from this improvement? And each owners' contribution towards the cost as a whole would be determined accordingly. And the excess of cost, as one sum, would have to be paid by the city. It seems indisputable that the total cost would thus be divided between the city and the property owners on a contingency that bears no relation to the number of feet in the street and alley crossings. Yet section 3 clearly separates the improvement itself and the liability therefor into two distinct parts.

Further, in regard to section 3, my Brethren say that it should be noted that the provision is "that the cost shall be estimated by the running foot, not assessed." They quote the definition that an assessment is the "adjusting of the shares of a contribution towards a common beneficial object according to the benefit received." Here, again, my Brethren seem to revert to the idea that the plan required by the "new" constitution is the only one in which special benefits are the sole basis for special assessments. But, as already shown, special benefits were the common starting point of the two divergent lines of thought. So, if the definition selected by my Brethren were the one the legislators had in mind, it would not disclose which method they intended to pursue. But it seems clear to me, from an examination of the whole act, that the definition the legislators intended to express was that an assessment is "an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within a district." And. Law Dict. In section 3, the part of the sentence that commands how the estimate shall be made, and what the liability of the lot owners shall be, ends with a semicolon, and the sentence proceeds: "and in making the assessment against such owners for the improvement of such lots or parts of lots and unplatted lands [the cost] shall be assessed upon the

ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement." Again in section 3: "Such assessments, with the interest accruing thereon, shall be a lien upon the property so assessed and shall remain a lien until fully paid." And in section 10: "In case any of the owners of lots or parcels of ground on which such assessments have been made shall fail or refuse for the space of twenty days after the date of the estimate to pay the amount thereof due by such person to such contractor, such contractor shall file his affidavit in the clerk's office of said city, stating that the whole or some part of said assessment remains unpaid," etc. And again in section 10: "And in case the court and jury shall find, upon trial, the proceedings of said officers subsequent to said order directing the work to be done, are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct said property to be sold," etc. It therefore seems clear that the legislature understood an "official estimate" to be an "assessment." And the legislature did not confine itself to the use of the word "estimate"; for, in the part of section 3 that my Brethren have omitted, it appears in plain words that the lots shall be "so assessed."

Again, it is said that section 3 contains no mandate that the property "shall ultimately be required to contribute equally per front foot." I do not see how language could be made clearer: "The owners of lots * * * shall be liable * * * in the ratio of the front line of their lots owned by them to the whole improved line." This liability is secured by a lien. It is the fund on which the contractor relies for payment. And it is the only fund, if the city is up to its debt limit, or becomes so after the contract is made, and before the work is completed. My Brethren say that section 3 requires "that the liability shall relate to the frontage."

But I take it that they do not mean to concede that the liability shall be according to the frontage. They only mean that the liability for special benefits in fact received, after it is determined at the conclusion of the work, is susceptible of being figured into a relation with the frontage,—a phase of the subject that has already been noticed sufficiently. But it is said that "the measure of liability and lien here mentioned are only conjectured, at most, since they arise before an ascertainment of the facts, by measurement, necessary to their definite determination." The order for the improvement, which enters into the contract, and the contract itself, disclose the dimensions, location, and character of the work, and the price per front foot, in terms, or in terms reducible to the front foot. So far as the contractor is concerned, the moment the contract is let he can determine the amount of liability of each property owner and of the city for street and alley crossings as well as when the work is finished. It is true that in the assessment made by the engineer, at the conclusion of the work, the "total cost" may include other items, such as advertising, etc.; but in these matters the contractor is not interested, for the contract is the limit of his claim and lien. City of Huntington *v.* Force, 152 Ind. 368, 53 N. E. 443. But, if there were any uncertainty in the amount finally to be allowed the contractor, no uncertainty would thereby be introduced into the liability; for the lien by the front foot could be fixed in advance for whatever amount the contractor's due proved to be.

In endeavoring to leave some purpose in section 3, my Brethren, if I comprehend their meaning, hold that the section does not fix any basis for assessments, but only provides for a *prima facie* calculation of liability. This seems to me a purpose that is contrary to the entire scope and manifest intent of the act. But I admit that it would be some purpose, if all the lot owners, except the "aggrieved" mentioned in section 7, might, by not objecting and not asking to be heard, accept the *prima facie* calculation as a correct statement of their liability. Such a construction, however, would

at once run counter to the objection that the statute did not provide for a "uniform and equal" rate of assessment. Suppose that the *prima facie* calculation was $1,000 against each, A. and B., who own equal frontage; that A. is "aggrieved," and B. is not; that A. proves to the satisfaction of the council that his special benefits actually received are $500; that A. offers to prove that B.'s special benefits actually received are $1,500; that the council agrees with A. as to the truth of the matter, but holds that, since B. has made no objections, nor appeared to be heard, B. has the right to accept the *prima facie* amount as the true amount. Then B. receives $500 in actual benefits that he does not pay for, and A. is compelled to pay (1) his special benefits actually received, (2)his proportion of the city's contribution on account of general benefits, and (3) his proportion of the special benefits accruiug to B. and all others similarly situated. Now, to avoid this difficulty, it is further held that all persons whose lands are included in the engineer's report are bound to take notice that the council will so increase or decrease the *prima facie* calculations as to make them equal the special benefits actually received. And in holding that the *prima facie* calculations are not even *prima facie* the true amounts, but that the amounts must be adjusted on the radically different basis of actual benefits, my Brethern come around to the original position of discarding all the steps provided for in the sections preceding the seventh, and of requiring the council to determine the assessments *de novo* on the basis of actual benefits; thus depriving section 3 of any intelligent purpose. It seems to me incredible that the legislature intended that its positive and explicit mandates expressed in the prior sections should be overborne by an implication read in section 7. And I think it equally faulty to suppose that the legislature intended that the contractor should bind himself, under penalty, to perform work, for the payment of which section 3 gives him a lien upon the abutting property by the front foot, and then that the common council, at the procuration of the property owners, should abro-

gate the contract, should destroy the improvement certificates or bonds, should approve and accept the work, and deprive the contractor of his pay. To quote from Hutcheson *v.* Storrie (Tex. Sup.) 51 S. W. 848, 45 L. R. A. 289: "In support of this conclusion, we call attention to the potent fact that the city had entered into a contract with Storrie for the performance of the work at a stipulated price, and with the agreement that he should be paid in improvement certificates, which would hold a lien upon the property, before the amount of the assessment was ascertained. If the engineer, for instance, committed an error in estimating the cost of the work in front of Mrs. Hutcheson's property, then a revision and correction of that act by the council could be had, and the wrong could be corrected, because the contract itself furnishes the data, and the correction would accord with the contract. If, however, the council had changed the basis of the assessment against Mrs. Hutcheson's property from the costs of the work to that of benefits received by the property, whereby the amount assessed would be lessened, the contract would have been annulled. A construction should not be placed upon the language that would empower the city to destroy the contract without the assent of Storrie." If the pavement contractors had understood this necessary result of the construction contended for in this and other cases pending in this court, they might not have been so ready to take contracts under an act which deprives them of the absolute right to definite liens on the lots of the property owners, and remits them to the uncertainty of collection from the municipalities. In Cason *v.* City of Lebanon (Ind. Sup.) 55 N. E. 768, it was held that a contractor, in contracting to do street improvement work under the Barrett law, must take notice of the city's indebtedness; that, if the contractor could not collect from the city for its part of the liability, the whole contract was not destroyed; that the consideration to be paid by the abutting property owners was sufficient to support the contract; and that the property owners had no ground of complaint unless the con-

tractors put in higher bids than they would have if the city's part of the expense was collectible. This strikes me as justifiable doctrine, if the improvement itself and the liability therefor are considered as divided into two distinct parts, which may be known to and examined by both the contractor and the property owners when the contract is let, and before the work is begun. But, under the construction of the Barrett law that is now adopted, the contract, at the time it is made, is severable neither as to the work nor as to the liability therefore. After the work as an entirety is done, a severance of the total liability is made; but until then no one could tell what was the extent of the city's liability, or what the property owners'. If, at the time the contract is entered into, the city be indebted to the limit, it is likely that the contractor's bid would be higher, on account of the uncertainty of getting his pay. Yet, no matter how high his bid, the chance of even getting his money back would depend upon a contingency, after his labor and materials were expended, entirely within the power and discretion of the adverse parties to the contract. And if, at the time the contract is entered into, the city have a debt-incurring margin to the amount of the contract, the council, without the consent of the contractor, could exhaust that margin in waterworks, electric lights, etc., and then find that the actual special benefits to the property owners were not half the amount of the contractor's expenditures. Street improvements are public improvements. Special benefits are benefits that are not common to the citizens in general. How much the contractor may collect as special benefits, and how much as general benefits, is left for his adversary in the contract to say.

By my Brethren's reading of section 7 (that is, that the council, on the hearing upon the engineer's report and the assessments therein, shall disregard the method of assessment pursued down to that point, and upon which the contract is based, and shall substitute a *de novo* inquiry into the special benefits actually received), the legislature is accused and

found guilty of ignorance of the meaning or even the existence of the word "benefits." Yet on the statute book, as already pointed out, there were many instances in which assessments for improvements were carefully provided for on the basis or by the method of ascertaining the special benefits, as a matter of fact, and limiting the assessments to that amount, and apportioning the cost in ratio to such benefits; and in this very statute (the Barrett law) assessments for the construction of sewers are directed to be limited and apportioned according to benefits. Hereinabove only the material parts of the act relating to street improvements have been referred to. In reference to the assessment lien given in section 3, the language concerning sewer construction is that "the cost of any such sewer shall be apportioned among the lands, lots, and parts of lots, benefited thereby, and according to such benefits, * * * and the owners * * * of the lots or parts of lots benefited by the construction of such sewer shall be liable, for the construction of such sewer, for the benefit of such lots or parts of lots thereby." In reference to the duties of the engineer in making his report to the council, the first six items from the sixth section relate to street improvements. The seventh item in that section relates to sewer construction: "Seventh. In the case of the construction of a sewer, a description of each lot or parcel of lot benefited thereby, together with the owner's name, and the fair proportion of the cost of such sewer, according to the benefits conferred thereby, that should be assessed against such lot or part of a lot." If a sewer is constructed, and a landowner objects to his assessment, the hearing on the engineer's report, provided for in section 7, gives him his "day in court" on the question of benefits, because the charge on which the hearing is had is that his lands should be assessed a certain sum, according to the benefits conferred. Sutherland says that attention should be given, not only to the language used, but also to "the words or expressions which obviously are by design omitted." Section 239. See, also, section 241. It seems strange to suppose that the

legislature did not know the vital difference between the engineer's assessment in street improvement cases and in sewer cases; between the lien declared in section 3 for street improvements and the lien declared in the same section for sewer construction; between a method of legislatively assuming and fixing the special benefits at the cost per front foot, as a matter of statute law, and a method of providing for a determination of the actual benefits, as a matter of fact. And the legislature's nice particularity in making these distinctions cannot be overborne, excepting by reading into section 7 an implication that renders meaningless many parts of the act, and ignores others. All of the matter in the Barrett law in reference to sewer construction was a new feature in street improvement statutes in this state. I believe my Brethren state the rule of construction correctly: "The intention is to be ascertained by considering the entire statute; and we must proceed as we would with any other composition, construing it with reference to the leading idea and purpose of the whole instrument. The general intent is the polar star by which the meaning of any part is to be determined with a view to harmonizing the entire act." But I do not understand the purpose in stating the rule, if it is not to be followed. I find that material parts of sections 3, 5, 6, 8, 9, and 10, and the whole of the interlaced sewer law, are omitted from consideration.

It is axiomatic that the constitutional provision authorizing the levy and collection of taxes is not self-executing. It is fundamental that the provision cannot be made operative by the executive department, nor by the judicial department, but only by the legislative department. It is elementary that the power must be carried into execution by appropriate legislation, and that no taxing bodies or officers can make a valid assessment unless they follow with substantial strictness the precise method prescribed by the statute. If the constitutional provision be read into the statute, it is not perceived how the situation is changed. If the provision is not self-executing as it stands in the consti-

tution, it is not self-executing when read into the statute. If it cannot rightfully be put into operation by the judicial department as it stands in the constitution, it cannot rightfully be put into operation by the judicial department when read into the statute. If it can only be carried into execution by appropriate legislation as it stands in the constitution, it can only be carried into execution by appropriate legislature when read into the statute. The appropriate legislation necessary to put into execution the constitutional provision for taxation, by the method of limiting assessments to actual benefits in street-improvements cases, cannot be supplied by the judicial department, it seems to me, without going outside its proper limits. The constitutional provision that "no man's property shall be taken by law without just compensation" is likewise not self-executing. It is a negative provision,—an inhibition. If the constitutional provision be read into the statute, what is accomplished? If it is only a negative provision, an inhibition, as it stands in the constitution, it is only a negative provision, an inhibition, when read into the statute. If affirmative legislation is needed to enable a city to act under the provisions as it stands in the constitution, affirmative legislation is needed to enable a city to act under the provision when read into the statute. In the place of the established principles for ascertaining judicially the legislative intent, substitute the following formula: Take a statute in which the only method prescribed for fixing assessments is by frontage, regardless of actual benefits, read into this statute the constitutional inhibition of the laying of assessments by that method, delete from the statute all that conflicts with inhibition, and amend the statute by adding thereto all the affirmative legislation that is needed to prescribe a method of apportioning and limiting assessments according to special benefits actually received. In other words, take a piece of paper, and erase what is on it, so that it becomes a blank. Then write upon it the necessary directions by which a constitutional provision that is not self-executing can be executed. "The certainty and

stability of the law are among its chief excellencies. By following this legal injunction, the common law has become a symmetrical system. The same authoritative rule applied to statutory construction gives a wholesome precision to dubious generalities, and otherwise removes doubts which arise upon obscure provisions and has a salutary tendency to give confidence to those who must act upon statutes but cannot settle their meaning." Suth. St. Const. § 313. "The aid of contemporaneous construction is invoked where the language of a statute is of doubtful import, and cannot be made plain by the help of any other part of the same statute, nor by the assistance of any act *in pari materia* which may be read with it, nor of the course of the common law to the time of its enactment. Under such circumstances the court may consider what was the construction put upon the act when it first came into operation. Where this has been given by enactment, it is conclusive. A contemporaneous construction is that which it receives soon after its enactment. This, after the lapse of time, without change of that construction by legislation or judicial decision, has been declared to be generally the best construction. It gives the sense of the community as to the terms made use of by the legislature. If there is ambiguity in the language, the understanding of the application of it when the statute first goes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law." *Id.* § 307. "The uniform legislative interpretation of doubtful constitutional provisions, running through many years, and a similar construction of statutes, has great weight. The contemporary and subsequent action of the legislature in reference to the subject-matter has been accepted as controlling evidence of the intention of a particular act." *Id.* § 311. "It is to be observed that in the comparison of different statutes passed at the same session, or nearly at the same time, this circumstance has weight; for it is usually referred

to as indicating the prevalence of the same legislative purpose, as rendering it unlikely that any marked contrariety was intended." *Id.* § 283. "The practical construction given to a doubtful statute by the public officers of the state, and acted upon by the people thereof, is to be considered. It is, perhaps, decisive in case of doubt." *Id.* § 309.

In the light of these canons of construction, it is important to examine the interpretation given to the Barrett law by the legislative, administrative, and judicial departments of the state during the 10 years that elapsed from 1889 to the adoption of the new constitution. But my Brethren pass by all of these considerations. In speaking of the judicial history of the state prior to 1889, they say: "That this court prior to 1889 supported the doctrine that the legislature had constitutional sanction to declare, as matter of law, that the special benefits to a particular district by an improvement were equally received by bordering property, and equal to the total cost, has little force as an argument. The answer to it is that the injustice and hardships resulting from the doctrine was potential in securing legislative action for the amelioration of the rule." The inquiry being the intent of the legislature, the so-called answer is a begging of the question. The judicial history prior to 1889 is useful in showing a long-continued judicial approval of a long-continued legislative policy, and in affording the basis for the presumption that no marked contrariety was intended in the Barrett law. But the judicial history since 1889 is more important because the Barrett law itself is involved. This judicial history is found to be a continued approval of a continuation of the long-settled legislative policy. Of this, my Brethren say: "There is language used in City of Terre Haute *v.* Mack, 139 Ind. 99, 38 N. E. 468, and perhaps in other cases in this and the appellate court, not necessary to the decision of any question presented by the record, that appears in conflict with what is here decided; but, in so far as such language may so appear, it is disapproved." In the first place, I think that an examination of

the cases will show that the language disapproved was necessary to the decision of the questions presented by the records. But, whether the language is disapproved because it is supposed to be dictum, or because it is thought the cases were wrongly decided, the disapproval cannot take those cases out of the judicial history of the state. As contemporaneous expositions of the legislative intent, acquiesced in by the legislature, their force is not dependent upon the correctness of the decisions from the court's present point of view. In Quill *v.* City of Indianapolis (May term, 1890) 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681, this statement was made: "Assessments for street improvements are upheld on the ground that the adjacent property upon which the cost of the improvement is assessed is enhanced in value to an amount equal to the sum assessed against it, and that the owners have received peculiar benefits, which the citizens do not share in common." In Paving Co. *v.* Edgerton (May term, 1890) 125 Ind. 455, 25 N. E. 436, after quoting the extract hereinbefore given from Gravin *v.* Daussman, the court said: "We have no reason to doubt the soundness of the doctrine enunciated in this case, and under this rule sections 6 and 7 of this act [the Barrett law] afford the owners of property abutting upon a street to be improved a remedy which the legislature, in its wisdom, deemed sufficient for their protection." In City of Terre Haute *v.* Mack (May term, 1894) 139 Ind. 99, 38 N. E. 468, a street improvement was made under the provisions of the Barrett law. The assessments were levied against the abutting property by the front-foot rule, except on a lot situated at the corner of another street. In the case of this lot, the amount to be assessed against it as a whole was determined by the frontage rule, the same as in the case of other lots abutting on the improved street. By the Barrett law the first 50 feet back from the front line is primarily liable for the assessment, and the remainder back to 150 feet is only secondarily liable. The first 50 feet of this lot was owned in three separate parcels. Mrs. Hudson owned the entire frontage. Her parcel extended back 19

feet. Froeb and Morgan owned the next parcel, extending across the lot; having a width of 18.6 feet, and fronting on the side street. Mrs. Mack owned the third parcel within the 50 feet, extending across the lot; having a width of 12.4 feet, and fronting on the side street. The engineer, in making his report, apportioned the assessment upon this lot among the three parcels in the ratio of actual benefits. The council, on the "hearing on such report and the assessments therein," approved and confirmed the apportionment by that method. On these facts, the assessment against Mrs. Mack's property was declared to be void, and the following principles were established: That the engineer's report is the only legal basis on which any assessment can be made against any land whatever; that no assessment can be made, except on an abutting lot; that such assessment can only be by the front foot; that the engineer cannot lay, nor can the common council adjudge, an assessment on any other rule than frontage, because no other basis or method is prescribed; that the revision goes only to the correction of errors, as indicated in Garvin *v.* Daussman. Among other things, the court said: "We have nothing to do with the policy, expediency, or justice of the statute. * * * It is a well-recognized rule in the interpretation of statutes that the whole act and all its parts must be construed together, so as to give effect to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature. The statute ought to be so construed as to make it a consistent whole. Suth. St. Const. §§ 239–246. It appears from the complaint and answer that the engineer reported an estimate in favor of the contractors against the property owners benefited thereby, to wit: Mary V. Hudson, on a strip or lot of ground on said Fifth street, 137.96 feet along said street and 19 feet wide, $297.06; Froeb & Morgan, a strip or lot 137.96 feet long, parallel with said street, 18.6 feet wide, adjoining the strip first described, $272.10; and Amanda D. Mack, a strip or lot 137.93 feet long, parallel with said street, adjoining the last-described strip,

and 12.4 feet wide,—said strips or lots being lots 1 and 2, and a part of lot 3 of said Blake's subdivision. Such an estimate as this, the engineer had no right to make. He was required by the statute, as we have seen, to report the amount of such cost for improvement upon the ground bordering on the improved street, which amount he was required to ascertain and fix by multiplying the average cost price by the number of front feet; also, the name of the owner of the lot so bordering on said street. The name of the owner of such lot was Mary V. Hudson, and, her lot being the only one that bordered on the improved street, the amount due upon it he was required to ascertain and fix by multiplying the average cost price per running foot by the number of running front feet of her lot. And this he was required to report to the common council, and such report the amended seventh section required the common council to approve and confirm, or, in case it was incorrect, to cause it to be amended, and to make the assessment according to such report. Therefore, if the statute had been followed by the city engineer and common council, the whole amount of cost of the improvement for which the whole 150 feet back from the line of Mrs. Hudson's lot bordering on the improved street could in any event be made liable would have been assessed against Mrs. Hudson's lot No. 1. Without the proviso in section 3, no person whose lot or ground does not border and abut on the improved part of the street could be made liable for any part of the cost of the improvement in any event. Ray *v.* City of Jeffersonville, 90 Ind. 567. But the proviso makes such land liable only in the event that the lots or parcels preceding it towards the front or border have proven insufficient to pay the cost of the improvement. And the amount for which such ground is in any event made liable is not fixed by any assessment or ascertainment either by the engineer or common council, but it is fixed and ascertained by the balance remaining unpaid of the whole amount assessed on the front-foot lot or parcel after the exhaustion of the parcels that precede it to

the front. That cannot be known and ascertained until such preceding parcels have been sold. Therefore the act of the engineer in fixing and apportioning any amount against the appellee's lot was without authority of law and void, and the act of the common council in assessing said amount against appellee's lot was void, and she was entitled to have it declared so." The engineer having made, and the council having confirmed, an assessment according to special benefits actually received, and their power to do so having been challenged, I cannot see why the language used, and a full consideration of the scope and intent of the Barrett law, were not necessary to a decision of the question presented by the record.

This case was considered from the point of view of Mrs. Mack. Look at it a moment from Mrs. Hudson's standpoint. She owned a parcel of land having 138 feet frontage and 19 feet depth. The assessment for 138 feet frontage was $730.21. If her parcel, after being improved, would not sell for enough to pay the assessment, and back-lying parcels had to be sold to make up the deficiency,—and such cases have occurred under the Barrett law,—where do the special benefits come in? Though the legislature should declare, as a matter of law, if it had the power, that the special benefits equaled the cost, it would be difficult for any one to point out wherein any special benefits, as a matter of fact, were derived from the proceeding. In Keith *v.* Wilson (May term, 1896) 145 Ind. 149, 44 N. E. 13, it was stated: "The law assumes that the property will be benefited to an amount equal to the cost of the improvements thus made." In Cason *v.* City of Lebanon (Ind. Sup.) 55 N. E. 768, it was claimed that a railroad company was bound by a contract with the city to improve the street, and that therefore an ordinance requiring the property owners to pay for the whole improvement, except street and alley crossings, was invalid. This court declared that "said contract did not deprive the city of the power to improve said street in the manner alleged in the complaint, at the expense of the abutting property

owners, as provided by law." Though the statute was not particularly discussed in that case, it is sufficiently clear that the court considered it settled that the law provided for the construction of street improvements, except street and alley crossings, "at the expense of the abutting property owners." In Sands *v.* Hatfield, 7 Ind. App. 357, 34 N. E. 654, it was decided that, if the engineer omitted from his report any abutting property, the common council, on this fact being shown by objectors at the "hearing," should correct the report and alter the assessments to what they would have been if the engineer had performed his duties properly in the first instance. The appellate court, on October 24, 1899, in Indianapolis & V. R. Co. *v.* Capitol Pav. & Const. Co., 54 N. E. 1076, said: "Conceding that appellant's right of way is 'land,' within the meaning of the charter, the question remains whether the right of way lying wholly within Kentucky avenue is within the designation of land abutting or bordering on the same avenue. We think the statement of the question furnishes its own solution. The city can assess only such lands as its charter designates, and, as the charter has designated lots or lands abutting or bordering on the street, none other can be assessed. We are not authorized to give the words used in the statute other than their well-defined and commonly accepted meaning. Conceding, without deciding or assuming, that the company's right of way is benefited by the improvement, the question is still unsolved, because the basis of the assessment is not property that will be benefited, but property that abuts or borders on the street. In authorizing the construction of such improvements, the legislature has assumed that they will benefit that property which abuts or borders on the part of the street improved. The right to impose such a tax is based upon a presumed equivalent. It has not been assumed that any property other than that designated will be benefited. What property the local officers may believe will be benefited is not the question. If a property owner is an abutting owner, he must bear his share of the burden, because the

legislature has so directed." So it appears that the judicial department of this state has always hitherto entertained the same belief in regard to the scope and intent of the Barrett law that it did in regard to the street improvement laws prior to 1889. The legislature has never indicated any dissent from this judicial interpretation, but, on the contrary, has shown its understanding and approval thereof.

The legislative department of this state made the method of assessment prescribed in the Barrett law conform to the constitutional requirements concerning taxation and compensation as that department has always understood them. That understanding was, in the language of Dillon (quoted in the dissenting opinion in Norwood *v.* Baker), that "whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the later mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present [then] weight of authority, considered to be a question of legislative expediency." The legislative department of this state has always understood that the only basis for special assessments was special benefits, but that it was a matter of legislative discretion to declare absolutely by law that the special benefits were always and invariably equal to the cost of the improvement; that if, in sewer and highway and drainage acts, the equality of cost and benefit were not absolutely declared by law, but were left open to the determination of the truth by the assessing officers, whose assessment of actual benefits was reviewable before some tribunal duly clothed with power and procedure to that end, it was a matter of legislative grace, and not a matter of constitutional compulsion; and that, if the legislature chose to exercise its discretion by declaring that the cost of street improvements should be assessed upon the abutting property by frontage,

the citizen could no more complain than in any other case in which the legislature had determined a question of legislative expediency. The Barrett law was enacted in 1889, and it was amended in 1891. It applies to all towns and cities not specially classified. In 1891 the legislature passed an act concerning the government and powers of cities of 100,000 population (Indianapolis). Acts 1891, p. 137. On pages 175–181 are the provisions relating to street improvements. The method prescribed is to assess the cost upon the abutting property by frontage; and no provision is made in the act for a "hearing" before the council or board of public works, but the property owners have only the hearing described in Garvin *v.* Daussman. And although at each subsequent session acts regarding street improvements have been passed, and the charter of Indianapolis has been amended, the legislature has seen no occasion for changing the foregoing method for paying for street improvements. In 1893 (Acts 1893, p. 56) the charter of Indianapolis was so amended that the cost of paving street and alley crossings, which had before been borne by the city, was assessed against the property owners, but the charter was left unchanged so far as a hearing is concerned. At the same session, on March 3, 1893 (*Id.* p. 65), an act was approved relating to the government and powers of cities of 50,000 population (Evansville). On pages 104–110 are the provisions relating to street improvements. These provisions are the same as those in the charter of Indianapolis. On the same day, March 3, 1893 (*Id.* p. 202), an act was approved relating to the government and powers of cities of 35,000 population (Ft. Wayne). On pages 243–249 are the provisions relating to street improvements. These provisions are substantially the same as those in the charter of Indianapolis and Evansville, except that the Barrett law is followed, in providing for a hearing upon the assessment before the board of public works. The case of City of Terre Haute *v.* Mack, 139 Ind. 99, 38 N. E. 468, was decided on October 16, 1894. At the next session of the legislature

after this decision, on March 11, 1895 (Acts 1895, p. 239), an act was approved that amended the charter of cities of 35,000 inhabitants so that the total cost of the improvement should be assessed by the front-foot rule upon the abutting property back to a line equidistant from the edge of the improved street and the next street parallel to it, but that, if a lot belonged to different persons, the assessment thereon should be apportioned among the several parcels according to the benefits received from the improvement by reason of being upon, near, or having access to it. Though other acts relating to street improvements were passed at this and each subsequent session, the act last above referred to remains the only instance in which the legislature has undertaken to prescribe the method of having the assessing officers assess and a tribunal determine special benefits, as a matter of fact, in street improvement cases. And, though this act is a very limited and imperfect application of the principle, it clearly illustrates two things: First, that the legislature understood the difference between "frontage" and "actual benefits"; second, that the legislature acted, as it always has, upon the assumption, sustained by the then weight of authority, that it was purely a question of legislative expediency whether or not the legislature should declare, as a matter of law, that each front foot was specially benefited to the extent of its *pro rata* share of the total cost. On the same day, March 11, 1895, an act was approved that amended the charter of cities of 50,000 inhabitants. Acts 1895, p. 258. Regarding street improvements, the charter was so amended as to require the board of public works, after making out the final assessment roll, to give notice of a day "on which said board will receive and hear remonstrances from persons with regard to their respective assessments. On the day named in such notice said board shall proceed to hear and determine such remonstrances and may change, modify or confirm the same. Said assessment roll shall contain the names of the property holders and a description of the property assessed for such improvement,

and shall contain the *pro rata* assessment against each piece of property. After hearing such remonstrances said department shall deliver such assessment roll as modified or confirmed to the department of finance." That the legislature intended in this, as in every other instance in which it was thought worth while to provide a hearing before a special tribunal, that the hearing should be upon the question whether or not the assessing officers had faithfully performed their duties according to statute, and had correctly reported the assessments as determined by the method prescribed for them to act upon,—that the review should be for the purpose of determining the correctness of the view,—is explicitly shown in another provision of this same act. Regarding sidewalk improvements, the charter was also amended so as to provide for a hearing after the assessment list has been prepared. "Upon the completion of said sidewalk said department shall cause to be prepared an assessment list, and shall notify such owner in the same manner as in this section above provided. Said notice shall fix a time and place when the owner may remonstrate against such assessment. On said day such owner may appear and remonstrate, and the board shall take final action and shall assess such owner and such real estate for the cost of such improvement." On March 15, 1895, an act came into effect by which the charter of cities of 100,000 inhabitants was again amended. Acts 1895, p. 384. Some minor changes were made in respect to collection of installments of assessments, etc., but the charter was not amended in the matters involved in the amendments of the charter of Ft. Wayne or of Evansville. At the next session, on February 23, 1897 (Acts 1897, p. 56), an act was approved whereby the charter of Indianapolis was further amended in reference to street improvements. It is a matter of common knowledge that the practice was generally adopted by city treasurers of notifying property owners by mail of the amounts of their assessments after they came into the hands of the treasurers for collection, and to state in the notice that it was given voluntarily, and

not as a duty required. This amendment made the giving of such notice by mail obligatory upon the treasurer of Indianapolis, and further required him to publish a notice to all persons who had failed to avail themselves of the privilege of paying in installments that, unless payment was made within 30 days, proceedings for the collection of assessments would be instituted. On February 26, 1897, the charter of Indianapolis was further amended. Acts 1897, p. 79. Some details about the cost of street and alley intersections, the issue of bonds, and the collection of installments were changed; but the proceedings for fixing the final assessments by the board of public works were left as they were prescribed in the original act of 1891. At the last session of the legislature, on March 3, 1899, an act was approved that related to the government and powers of cities of 23,000 population (Terre Haute). Acts 1899, p. 270. In its essential features, it is the same as the charters of Evansville and Ft. Wayne. On pages 314–322 are the provisions concerning street improvements. The assessments for that purpose are to be made by the front-foot rule. But the assessments for sewer construction, according to the directions of every one of these acts, are to be laid upon the lands found to be benefited, and are to be apportioned according to, and not exceeding, the special benefits actually received. On March 4, 1899, an act was approved that again amended the charter of Indianapolis in reference to street improvements. Acts 1899, p. 399. The amendment provides for an appraisement of the abutting property, exclusive of improvements, and forbids the ordering of any improvement which, when completed, is to cost more than 25 per cent. of the aggregate appraised value. This still leaves any parcel of abutting property liable to an assessment by frontage that might exceed to value of that parcel. And the hearing before the council or board of public works as to the correctness of the assessments, on which the present construction of the Barrett law is built up, has remained unprovided for to the end. Is it conceivable that the legis-

lature foresaw the new constitution, and entertained the deliberate design of making some of these acts constitutional and others unconstitutional? Assuredly not. This whole series of acts, from the Barrett law of 1889 to the last amendment of the charter of Indianapolis, in 1899, evidences a continuous and consistent legislative policy. That policy was to put street improvements upon a different basis from sewers and ditches and roads, and other like special proceedings. These street improvement statutes are the ones my Brethren should have examined if they were seeking acts *in pari materia* by which to determine the scope and intent of the Barrett law. The sewer and ditch and gravel-road laws are only *in pari materia* with the sewer law interwoven in the act of 1889, which my Brethren pass by without notice. The legislature never doubted that it had the power to do as it did. It assumed that it was purely a question of legislative expediency to require the whole cost of street improvements to be assessed upon the property by the running foot. The administrative department of the state, as represented in the various towns and cities, have uniformly acted under the law on the same assumption. It is a matter of common knowledge that the people, the lawyers, the contractors, the municipal officers, the legislature, and the courts have all been in accord in the understanding that under the Barrett law the city paid for street and alley crossings, and the abutters paid the rest of the total cost of street improvements according to a uniform rate per front foot, until the exigency arose, after the Norwood-Baker decision was studied, of hunting for some other meaning. If the continuous and consistent interpretation of the Barrett law, during all the years since its passage, by all the departments of the state, were looked to, and if the canons of construction as laid down in the books were followed, that construction should be accepted as decisive.

Thus far I have been stating the reasons why I am unable to join my Brethren in finding in section 7 the "implied power" that authorizes the council to change the basis of the

assessments. But it seems to me there is a vital difference between a power and a duty,—between the right to do a thing and the obligation to do it. In this case, the record shows, it is admitted that the council has already decided that it will not accord the property owners a hearing on the question of the amount of special benefits actually conferred by the improvement. Where is the command in the statute that forbids the council from basing the assessments upon the report of the engineer after it has been amended, if necessary, to conform to what the statute commanded the engineer to do in the first instance? If the legislature delegated to the council a discretion in the matter, the property owners could not base a suit for mandatory injunction upon what they deemed a mistaken exercise of that discretion. The statute says that the council "may adopt, alter or amend the engineer's report and the assessments therein"; not, "shall change the basis of assessments." The statute permits the council to pay all or any part of the total cost of the improvement out of the treasury. This is purely and simply a matter of option. If the council paid the total cost, there would be no assessments. If the council determined to pay a certain portion of the total cost, the residue of the total would have to be assessed against the abutting property in the method provided by the statute. In this case, the record shows, it is admitted that the council has already ordained that the total cost shall be borne by the abutters. Now, if the improvement is to cost $10,000, and it should be found on the supposed hearing that the aggregate of special benefits actually received by the several parcels of abutting property was only $8,000 (though the complaint avers and the demurrer admits that the abutting property is not specially benefited at all, as a matter of fact), what good would it do to have the total cost apportioned among the abutters in the ratio of the special benefits, as among themselves? Each abutter would find his property assessed with 125 per cent. of his special benefits. So it becomes necessary to find, both in the law and in appellee's ordinance under the law, not

only the right, but the duty, to pay the $2,000 excess out of the general treasury, although it is agreed that the city ordered the improvement with the intention and in the belief that it had the power to ordain "that the cost and expense thereof, including advertising, labor and material for the same, be assessed against the property on the line." And in the opinion filed by my Brethren, though I notice that considerable attention is given to making out the "implied power," I fail to find anything but a fiat that transforms the "implied power" into an "imperative duty." The views I entertain are supported by authority. In Hutcheson *v.* Storrie, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289, and in Lyon *v.* Town of Tonawanda (C. C.) 98 Fed. 361, statutes were involved that are essentially the same as the Barrett law; and in Charles *v.* City of Marion (C. C.) 100 Fed. 538, the Barrett law was considered. I may also cite the last page of my Brethren's opinion, wherein the rules regarding "implied powers" are properly indicated.

Not only am I constrained to believe that the Barrett law as enacted is unconstitutional, but I am also of the opinion that the Barrett law as now construed by my Brethren is unconstitutional. And I will suggest some of the reasons for thinking so: The taxing power is committed to the legislative department, and cannot be conferred upon the judicial. All assessments must be made by administrative officers, whose sole authority is to follow with substantial strictness the method pointed out by law. The property owner is entitled to a "day in court" to challenge the assessment. The court cannot make the assessment, but can only hear the challenge of the assessment already made, and then enter judgment confirming or correcting the assessment. If the engineer does not make the assessment as an administrative officer, and if the council does not merely review the assessment as a court, but if, on the contrary, no assessment is made until the council makes it on the hearing, the result is either that the assessment is made by a judicial tribunal, or that the hearing is for the purpose of

enabling an administrative body to determine what assessment to make, with no opportunity for the property owner thereafter to challenge its correctness. A common council may at one time exercise legislative, at another administrative, and at another judicial, functions, but it cannot have two or three characters at the same time. If the prescribed mode of fixing assessments by frontage is deleted from the statute as enacted, there is not a word left limiting the council to any method or prescribing any rule of procedure whatever. There would likely be as many methods as there are towns and cities in the state. Uncertainty would probably prevail until, in suits involving the Barrett law as now construed, this court formulated a definite and uniform procedure. I cannot concur in the statement that: "The absence of an express rule for guidance in the exercise of the power does not impair it. It is sufficient if the power to change the assessment from the frontage rule exists." Regulations and methods in all tax matters must be prescribed by law. Board *v.* Holliday, 150 Ind. 216, 49 N. E. 14. In the syllabus of Barnes *v.* Dyer, 56 Vt. 469, it is said: "A statute empowering the authorities of a city to construct sidewalks, and make local assessments on the property fronting the same 'for so much of the expense thereof as they shall deem just and equitable,' is unconstitutional, in that there is no fixed, certain, and legal standard for assessment." In New Brunswick Rubber Co. *v.* New Brunswick Com'rs of Streets and Sewers, 38 N. J. Law, 190, 20 Am. Rep. 380, the following appears: "It is not sufficient that the legislative act merely declares that the cost, or a part of the cost, of the improvement shall be assessed upon the lots drained by the sewers to be built. It must, as well, establish some rule, some definite scheme, within constitutional limits, for the apportionment of the tax upon the lands on which such special burthen is imposed. An act of the legislature directing a tax for a local improvement to be imposed upon particular lands, to be legal or effectual, must consist of something more than a mere

authorization to assess a sum of money, the cost of a local improvement upon the designated property. The act must determine the mode of distributing the burden, the property out of which the tax is to be made must be designated, and some certain standard of assessment established. It cannot properly be left by the legislature to the discretion of others to fix the method,"—courts, for example. A property owner is entitled to a law that operates according to constitutional principles without his intervention. According to the Barrett law as now construed, a property owner does not have a tax that is assessed on the basis of his actual special benefits, without affirmative action on his part at the hearing to see that it is put on that basis. Further, a lawful assessment must show on its face the principle according to which it is laid. New Brunswick Rubber Co. *v.* New Brunswick Com'rs of Streets and Sewers, *supra*. This would appear under the Barrett law as enacted, but not as construed. It seems to me that the property owner is subjected to a tax "without due process of law." The abutters alone are named in the engineer's report. My Brethern hold that all such persons are bound by the published notice to know that assessments will be made at the hearing which shall correspond with special benefits actually received. They do not hold, as I understand them, that persons who are not abutters must take notice that their back-lying property will be assessed for actual benefits. The Barrett law as enacted made such persons secondarily liable. This was so, as was pointed out in City of Terre Haute *v.* Mack, 139 Ind. 99, 38 N. E. 468, not because they were included in the assessment either as made by the engineer or as confirmed by the council, for they were not, but because the statute made them sureties, so to speak. Now, under the Barrett law as enacted, the legislature created a uniform taxing district, over all of which the contractor had his lien. But, under the Barrett law as construed, an irregular district is created, without any valid reason inhering in the subject-matter of the act to warrant the irregularity, and the lien of the contractor is to that

extent diminished. If A. owns a parcel having 50 feet frontage and 150 feet depth, and B. owns a parcel having 50 feet frontage and 20 feet depth, and C. owns a parcel having 50 feet width and 130 feet depth, and lying back of B.'s parcel, it seems to me that if A. is liable for actual special benefits on his 7,500 square feet, and B. is liable on his 1,000 square feet, and C. is not liable at all on his 6,500 square feet, not only is the taxing district irregular without reason, but the parties are not subjected to a "uniform and equal rate of assessment." The notice provided for in section 7 is not sufficient to give the council jurisdiction over any subject except "objections," nor any person except one "aggrieved." In Kuntz *v.* Sumption, 117 Ind. 1, 7, 19 N. E. 476, 2 L. R. A. 658, the court said of the board of equalization statute: "It does provide notice sufficient for two classes of judgment, but for no others. It provides for notice sufficient as to all general changes in the levy, and sufficient as to all who have complaints to make, and over these matters jurisdiction arises when the notice is given as the statute directs. But there is no provision for notice to the individual taxpayer whose list is to be added to or whose valuation is to be increased. * * * This notice, it is obvious, cannot require every taxpayer in the county to be in attendance at the meeting of the board to see that no additions are made to his list." The contract is made between the contractor and the council for the city. Under the Barrett law as enacted, the liability of the city was limited to the cost of street and alley crossings, and under section 7 the council had no discretion and no duty but to see that the balance of the cost was properly apportioned among the property owners according to frontage. The council, for the city, has control of the expenditure of the general fund; but, under the Barrett law as enacted, no conflict of interest arose among the council and the property owners and the contractor. Under the Barrett law as construed, however, a three-cornered conflict of interest at once arises, and the council is made the exclusive and final judge in its own case. In Board *v.* Heaston, 144 Ind. 583, 41 N.

Notes

E. 457, 43 N. E. 651, it was held that a board of county commissioners, in allowing or disallowing claims against the county, acted merely in the capacity of an auditing committee. The court said: "If it was a suit against the county for the recovery of money, in the sense urged by counsel, then the claimant was the plaintiff and the county the defendant, and the commissioners were in the discharge of a double duty,—acting as a court, and also as the representative of the defendant,—or otherwise the county could not be said to be in court. Such a construction as contended for apparently leads to an absurdity. It would follow that the court and the party defendant were virtually the same. It is an axiom of the law that no man can be a judge in his own case." A proper method of giving the people "due process of law" is illustrated in our statute in reference to the opening of streets. In that statute it is recognized that the general treasury will be subjected to an indefinite liability, and the city is not made the exclusive and final judge in its own case. On the whole, it seems to me that my Brethren, in steering away from the rock of Scylla, have plunged into the whirlpool of Charybdis.

NOTES.

Local Assessments—Frontage Rule.—See generally *note*, 3 Mun. Corp. Cas. 257 *et seq.* It is ordinarily held that local assessments may be made on abutting premises according to the frontage rule of valuation.

California.—Harney *v.* Benson, 113 Cal. 314; Emery *v.* San Francisco Gas Co., 28 Cal. 345; Whiting *v.* Townsend, 57 Cal. 515; Oakland Pav. Co. *v.* Rier, 52 Cal. 270; Chambers *v.* Satterlee, 40 Cal. 497; Whiting *v.* Quackenbush, 54 Cal. 306; Sinton *v.* Asbury, 41 Cal. 525; Jennings *v.* Le Breton, 80 Cal. 8; Burnett *v.* Sacramento, 12 Cal. 76; People *v.* Burr, 13 Cal. 343; Emery *v.* Bradford, 29 Cal. 75; Walsh *v.* Mathews, 29 Cal. 123; Taylor *v.* Palmer, 31 Cal. 240; Crosby *v.* Lyon, 37 Cal. 242; Reclamation Dist. *v.* Hagar, 6 Sawy. 569.

Colorado.—Pueblo *v.* Robinson, 12 Colo. 593; Denver *v.* Knowles 17 Colo. 204, 30 Pac. Rep. 1041.

Notes

Georgia.—Hayden *v.* Atlanta, 70 Ga. 817, 7 Am. & Eng. Corp. Cas. 228; Speer *v.* Athens, 85 Ga. 49, 9 L. R. A. 402; Bacon *v.* Savannah, 86 Ga. 301, 32 Am. & Eng. Corp. Cas. 243.

Illinois.—Payne *v.* South Springfield, 161 Ill. 285, 44 N. E. 105; Illinois, etc., R. Co. *v.* Elmhurst, 165 Ill. 148, 46 N. E. 437; Walker *v.* Aurora, 140 Ill. 402; Craw *v.* Tolono, 96 Ill. 255; Bigelow *v.* Chicago, 90 Ill. 49; Fagan *v.* Chicago, 84 Ill. 227; Enos *v.* Springfield, 113 Ill. 65; Springfield *v.* Sale, 127 Ill. 359; Galesburg *v.* Searles, 114 Ill. 217; Watson *v.* Chicago, 115 Ill. 78; Sterling *v.* Galt, 117 Ill. 11; Springfield *v.* Green, 120 Ill. 269; Wilbur *v.* City of Springfield, 123 Ill. 395; White *v.* People, 94 Ill. 604.

Indiana.—Kirland *v.* Board of Pub. Works, 142 Ind. 123, 41 N. E. 374; Palmer *v.* Stumph, 29 Ind. 339.

Iowa.—Amery *v.* Keokuk, 72 Iowa 701.

Kansas.—Burnes *v.* Atchison, 2 Kan. 455; Parker *v.* Challiss, 9 Kan. 155.

Kentucky.—Joyes *v.* Shadburn (Ky.), 13 S. W. Rep. 361; Covington *v.* Boyle, 6 Bush (Ky.) 204; Howell *v.* Bristol, 8 Bush (Ky.) 493; Covington *v.* Worthington, 88 Ky. 206; Ludlow *v.* Cincinnati S. R. Co., 78 Ky. 357.

Louisiana.—New Orleans *v.* Elliott, 10 La. 59; Barber Asphalt Paving Co. *v.* Gogreve, 41 La. Ann. 251.

Maryland.—Baltimore *v.* Johns Hopkins Hospital, 56 Md. 1; Howard *v.* Church, 18 Md. 451; Moale *v.* Baltimore, 61 Md. 224, 4 Am. & Eng. Corp. Cas. 544.

Massachusetts.—Leominster *v.* Conant, 139 Mass. 384; Fairbanks *v.* Fitchburg, 132 Mass. 42; Sears *v.* Boston (Mass.), 53 N. E. 138, 1 Mun. Corp. Cas. 497.

Michigan.—Hoyt *v.* East Saginaw, 19 Mich. 39, 2 Am. Rep. 76; Jones *v.* Board of Water Commissioners, 34 Mich. 273; Kalamazoo *v.* Francoise, 115 Mich. 554, 73 N. W. 801; Motz *v.* Detroit, 18 Mich. 495; Sheley *v.* Detroit, 45 Mich. 431; Warren *v.* Grand Haven, 30 Mich. 24; Williams *v.* Detroit, 2 Mich. 560.

Minnesota.—Ramsey County *v.* Robert P. Lewis Co., 72 Minn. 87, 75 N. W. 108, 42 L. R. A. 639; State *v.* Reis, 38 Minn. 371, 20 Am. & Eng. Corp. Cas. 473.

Where the land has not been platted, deduction must be made for streets which would be laid out if the land were platted. Ramsey County *v.* Robert P. Lewis Co., 72 Minn. 87, 75 N. W. 108, 42 L. R. A. 639.

Missouri.—Johnson *v.* Duer (Mo.), 21 S. W. 800; Neenan *v.* Smith, 50 Mo. 525; Rutherford *v.* Hamilton, 97 Mo. 543; St. Joseph *v.* O'Donoghue, 31 Mo. 345; Powell *v.* St. Joseph, 31 Mo. 347; Fowler *v.* St. Joseph, 37 Mo. 228; Farrar *v.* St. Louis, 80 Mo. 394; Kiley *v.* Cranor, 51 Mo. 541; Weber *v.* Schergeus, 59 Mo. 390; St. Louis *v.*

Clemens, 49 Mo. 552; St. Joseph *v.* Anthony, 30 Mo. 538; Palmyra *v.* Morton, 25 Mo. 594.

North Carolina.—Raleigh *v.* Peace, 110 N. Car. 32, 37 Am. & Eng. Corp. Cas. 360, 17 L. R. A. 330; Hilliard *v.* Asheville, 118 N. Car. 845, 24 S. E. Rep. 738.

New Jersey.—McKevitt *v.* Hoboken, 45 N. J. L. 482; Central N. J. Land, etc., Co. *v.* Bayonne, 56 N. J. L. 297; State *v.* Elizabeth, 31 N. J. L. 547; State *v.* Elizabeth, 30 N. J. L. 365; State *v.* Passaic, 37 N. J. L. 65; Hand *v.* Elizabeth, 30 N. J. 365; Raymond's Estate *v.* Borough of Rutherford (N. J.), 27 Atl. Rep. 172, 29 Atl. Rep. 156; State *v.* Fuller, 34 N. J. L. 227.

New York.—*Re* Van Antwerp, 56 N. Y. 261; Stebbins *v.* Kay, 51 Hun (N. Y.) 589; O'Reilly *v.* Kingston, 114 N. Y. 439; Mansfield *v.* Lockport, 52 N. Y. Supp. 571.

North Dakota.—Roberts *v.* First Nat. Bank (N. Dak.), 79 N. W. 1049; Rolph *v.* Fargo, 7 N. Dak. 640, 76 N. W. 242, 42 L. R. A. 646.

Ohio.—Parmelee *v.* Youngstown, 43 Ohio St. 162; Upington *v.* Oviatt, 24 Ohio St. 232; Kinney *v.* DeMar, 7 Ohio C. C. 250; Northern Ind. R. Co. *v.* Connelly, 10 Ohio St. 159; Ernst *v.* Kunkle, 5 Ohio St. 520; Crawford *v.* Cincinnati, 26 Ohio 215; Corry *v.* Folz, 29 Ohio St. 320; Creighton *v.* Scott, 14 Ohio St. 438; Wilder *v.* Cincinnati, 26 Ohio St. 284; Haviland *v.* Columbus (Ohio), 34 N. E. Rep. 679; Cherington *v.* Columbus (Ohio), 34 N. E. Rep. 680.

Oregon.—Wilson *v.* Salem (Ore.), 34 Pac. Rep. 9; King *v.* Portland, 2 Ore. 146.

Pennsylvania.—*In re* Washington Avenue, 69 Pa. 352, 8 Am. Rep. 260; Scranton *v.* Bush, 160 Pa. St. 499, 28 Atl. Rep. 926; Witman *v.* Reading, 169 Pa. St. 375, 32 Atl. Rep. 576; Lipps *v.* Philadelphia, 38 Pa. St. 503; *In re* Washington Av., 69 Pa. St. 361; Hand *v.* Fellows (Pa.), 148 Pa. St. 456, 23 Atl. Rep. 1126; McCall *v.* Coates (Pa.), 23 Atl. Rep. 1127; Stroud *v.* Philadelphia, 61 Pa. St. 255; Spring Garden *v.* Wistar, 18 Pa. St. 195; Pittsburgh *v.* Woods, 46 Pa. St. 113; McGonigle *v.* Alleghany, 44 Pa. St. 118; McGee *v.* Com., 46 Pa. St. 358; Pennock *v.* Hoover, 5 Rawle (Pa.) 291; Wray *v.* Pittsburgh, 46 Pa. St. 365; Philadelphia *v.* Tyron, 35 Pa. 401; Michener *v.* Philadelphia, 118 Pa. St. 535; Chester *v.* Black, 132 Pa. St. 570; Harrisburg *v.* McCormick, 129 Pa. St. 213.

Rhode Island.—Cleveland *v.* Tripp, 13 R. I. 50.

South Dakota.—Winona, etc., R. Co. *v.* Watertown, 1 S. Dak. 46; Tripp *v.* Yankton, 10 S. D. 516, 74 N. W. 447.

Texas.—Hutcheson *v.* Storrie (Tex.), 48 S. W. 875; Harrell *v.* Storrie (Tex.), 47 S. W. 838.

Vermont.—Allen *v.* Drew, 44 Vt. 174.

Virginia.—Norfolk *v.* Chamberlain, 89 Va. 196; Norfolk *v.* Ellis, 26 Gratt. (Va.) 224; Davis *v.* Lynchburg, 84 Va. 861.

Adams *v.* City of Shelbyville

Washington.—New Whatcom *v.* Bellingham Bay Imp. Co., 16 Wash. 131, 47 Pac. Rep. 236.

Wisconsin.—State *v.* Portage, 12 Wis. 562; Meggett *v.* Eau Claire, 81 Wis. 326; Hennessy *v.* Douglas County (Wis. 1898) 74 N. W. Rep. 983.

Assessments against abutting lots according to frontage for a street improvement are not rendered void for inequality by the mere fact that the lands assessed differ somewhat in depth and value. Beaumont *v.* Wilkesbarre, 142 Pa. St. 198.

Where the benefits have been justly assessed among those benefited, an assessment according to frontage is legal, even though the depth of the lot so assessed varies. Long Branch Police, S. & I. Comm. *v.* Dobbins, 61 N. J. L. 659, 40 Atl. 599.

Where the statute authorizes the city government "to assess two-thirds of the cost * * * on the real estate abutting on each side of the street or lane improved," and requires "the frontage" of intersecting streets and lanes to be assessed as real estate abutting on the street improved, the assessment may be apportioned among the several property owners by frontage alone, without reference to the depth, superficial area, or estimated value of the various parcels of abutting property. Bacon *v.* Savannah, 86 Ga. 301, 32 Am. & Eng. Corp. Cas. 243.

Where the assessments are required by statute to be made according to frontage, surface inequality of the land will not authorize a departure from the provision. McKeesport *v.* Busch, 165 Pa. St. 628, 30 Atl. Rep. 1019.

An assessment according to frontage, in a compactly built part of a city, is not invalid because there are vacant lots upon the street, which do not receive so much benefit from the improvement as those lots in actual use. Beaumont *v.* Wilkesbarre, 142 Pa. St. 198.

Under a charter authorizing assessors to assess the expense of a street improvement upon the property which they shall deem more immediately benefited by the improvement, which borders on or touches the street, an assessment according to the number of feet front owned by each individual is within their discretion. O'Reilley *v.* Kingston, 114 N. Y. 439. And where there is a statutory provision authorizing the aldermen to cause necessary improvements to be made and to apportion them equally among the inhabitants by assessments, the city may adopt the frontage rule, even though the charter makes no provision as to the method of assessment, but merely authorizes the charging of the cost of improvements against the abutting owners. Raleigh *v.* Peace, 110 N. Car. 32, 37 Am. & Eng. Corp. Cas. 360.

Property cannot be assessed according to frontage where it is provided that assessments must be according to benefits secured. Hayes

v. Douglas Co., 92 Wis. 429, 31 L. R. A. 213, 65 N. W. 482; Violett *v.* Alexandria, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382; Harrisburg *v.* Adams, 5 Pa. Dist. Rep. 379; Crawfordsville Music Hall Ass'n *v.* Clements (Ind. App.), 39 N. E. 540; Ogden *v.* Hudson, 29 N. J. L. 104; St. John *v.* East St. Louis, 50 Ill. 92.

Each lot is liable separately, under a frontage assessment. Younglove *v.* Hackman, 43 Ohio St. 69.

Inequality, unless amounting to extortion and confiscation, does not make an assessment according to frontage void. Hutcheson *v.* Storrie (Tex.), 48 S. W. 875.

Records and plats are the proper guides for officials by which to determine what lots front on an improvement. Scott County *v.* Hinds (Minn.), 52 N. W. 523; Beamont *v.* Wilkesbarre, 142 Pa. St. 198.

An assessment for paving cannot exceed the cost per running foot to which it was limited in the consent of the property owners essential to the ordering of such paving. Barber Asph. Pav. Co. *v.* Watt (La.), 26 So. Rep. 70.

Assessment by frontage cannot be changed to assessment by benefits after the improvement has been made. Dick *v.* Toledo, 11 Ohio C. C. 349.

Pa. Act 1889, art. 5, § 3, par. 10, provides that the expense of paving streets in the cities of the third class may be charged in whole or in part on the city, or on land bounded on the street paved, "in proportion to the number of feet the same fronts on the street * * * paved." *Held*, that assessments for such paving may be levied according to the foot-front rule notwithstanding Act 1891 which authorizes all cities to grade and pave their streets at the expense of the property benefited, upon the petition of a majority in number and interest of those to be affected by the improvement, as the latter system is not inconsistent with, and does not supersede, the other. Hand *v.* Fellows (Pa.), 23 Atl. Rep. 1126.

Property can be assessed according to frontage only, where the ordinance specifies that method. Ware *v.* Jerseyville, 158 Ill. 234, 41 N. E. 736.

Only the real front may be considered in estimating frontage. Haviland *v.* City of Columbus, 50 Ohio St. 471, 34 N. E. 679.

"Front foot" and "abutting foot" are synonymous. Moberly *v.* Hogan, 131 Mo. 19, 32 S. W. 1014.

Value of the particular land assessed need not be the limit of the amount of the assessment. Rolph *v.* Fargo (N. Dak.), 76 N. W. 242; Harrisburg *v.* McCormick, 129 Pa. St. 213.

Same—Same—*Contra.*—But the constitutionality of the frontage method has been denied, and it would seem that one of the most

Notes

recent of these cases, Village of Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187, will have decided weight in overthrowing this method of assessment. The following cases deny the constitutionality of the method. Peay *v.* Little Rock, 3 Ark. 31; Monticello *v.* Banks, 48 Ark. 251; Clapp *v.* Hartford, 35 Conn. 66; Woodbridge *v.* Detroit, 8 Mich. 274; Motz *v.* Detroit, 18 Mich. 495; Williamsport *v.* Beck, 128 Pa. St. 147; Taylor *v.* Chandler, 9 Heisk. (Tenn.) 349; Norfolk *v.* Ellis, 26 Gratt. (Va.) 224; State *v.* Portage, 12 Wis. 362.

Property cannot be assessed according to frontage without regard to special benefits. Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187; State *v.* Ramsey Co., Dist. Ct., 29 Minn. 62; Warren *v.* Grand Haven, 30 Mich. 31; Chicago *v.* Baer, 41 Ill. 306; Chicago *v.* Larned, 34 Ill. 203; Johnson *v.* Milwaukee, 40 Wis. 315; Chamberlain *v.* Cleveland, 34 Ohio St. 551; State *v.* Hudson, 29 N. J. L. 105; State *v.* Com'rs, 38 N. J. L. 195; State *v.* Jersey City, 40 N. J. L. 485.

Gross disproportion between benefit and assessment will render statute authorizing assessment unconstitutional. Weed *v.* Boston (Mass.), 51 N. E. 204.

Such method is not constitutional where no opportunity is given the owner to question the existence of benefit or the fact of undue burden compared with that imposed upon similarly situated lots and where the assessment is made without regard to the benefit. Fay *v.* Springfield (C. C.), 2 Mun. Corp. Cas. 162, 94 Fed. Rep. 409.

Assessment against rural property according to frontage is unconstitutional. City of Pittsburgh's Appeal, 118 Pa. St. 458; Philadelphia *v.* Rule, 93 Pa. St. 15; Scranton *v.* Penna. Coal Co., 105 Pa. St. 445; Keith *v.* Philadelphia, 126 Pa. St. 575, 27 Am. & Eng. Corp. Cas. 93; Seely *v.* Pittsburgh, 82 Pa. St. 360; Kaiser *v.* Weise, 85 Pa. St. 366; Craig *v.* Philadelphia, 89 Pa. St. 265; Cleveland *v.* Tupp, 13 R. I. 61; Webber *v.* Reinhart, 73 Pa. St. 370; Stewart *v.* Philadelphia, 4 Cent. Rep. 674.

Same—Districts.—There being no constitutional restriction, the legislature may create a district on which the assessment is to be imposed, or may delegate the creation of such district to the municipal governing body.

United States.—Bauman *v.* Ross, 167 U. S. 548, 17 Sup. Ct. 966. See also Gillette *v.* Denver, 21 Fed. Rep. 822, 7 Am. & Eng. Corp. Cas. 234.

Arkansas.—Little Rock *v.* Katzenstein (Ark.), 12 S. W. 198.

California.—Piper's Appeal, 32 Cal. 530.

Illinois.—Dunham *v.* People, 96 Ill. 331; Bradford *v.* Pontiac, 165 Ill. 612, 46 N. E. 794; Shaw *v.* Dennis, 10 Ill. 416; People *v.* Brislin, 80 Ill. 432; Shaw *v.* Dennis, 10 Ill. 405; Bigelow *v.* Chicago, 90 Ill. 49.

Notes

Indiana.—Monroe County Com'rs *v.* Harrell, 147 Ind. 500, 46 N. E. 124.

Iowa.—Grimmell *v.* Des Moines, 57 Iowa 144.

Kansas.—Atchison *v.* Price, 45 Kan. 296, 33 Am. & Eng. Corp. Cas. 130. See also Blair *v.* Atchison, 40 Kan. 353.

Kentucky.—Ludlow *v.* Cincinnati So. R. Co., 78 Ky. 357; Shelby County *v.* Railroad Co., 5 Bush (Ky.) 225; Broadway Bapt. Church *v.* McAtee, 8 Bush (Ky.) 508.

Maryland.—Baltimore *v.* Hughes, 1 Gill & J. (Md.) 493.

Michigan.—Hoyt *v.* East Saginaw, 19 Mich. 39; Davies *v.* Saginaw, 87 Mich. 439.

Minnesota.—Carpenter *v.* St. Paul, 23 Minn. 232; State *v.* Board of Public Works, 27 Minn. 442; Rogers *v.* St. Paul, 22 Minn. 494. See also State *v.* Ramsey Co., 33 Minn. 295, 7 Am. & Eng. Corp. Cas. 246.

Mississippi.—Alcorn *v.* Harner, 38 Miss. 652.

Missouri.—Kansas City *v.* Baird, 98 Mo. 215; St. Louis *v.* Peters, 36 Mo. 456; Uhrig *v.* St. Louis, 44 Mo. 458.

New Jersey.—Sigler *v.* Fuller, 34 N. J. L. 154.

New York.—Sun. Mut. Ins. Co. *v.* New York, 8 N. Y. 241; Genet *v.* Brooklyn, 99 N. Y. 296; McKechnie Brewing Co. *v.* Canandaigua, 44 N. Y. Supp. 317, 15 App. Div. 139; People *v.* Buffalo, 147 N. Y. 675, 42 N. E. 344; Howell *v.* Buffalo, 37 N. Y. 267; McLaughlin *v.* Miller, 124 N. Y. 510; People *v.* Lawrence, 41 N. Y. 140; Litchfield *v.* Vernon, 41 N. Y. 123.

Ohio.—Bowles *v.* State, 37 Ohio St. 35; State *v.* Com'rs, 37 Ohio St. 526; Hill *v.* Higdon, 5 Ohio St. 243; Kelly *v.* Cleveland, 34 Ohio St. 468; Kent *v.* Perkins, 36 Ohio St. 639; Scovill *v.* Cleveland, 1 Ohio St. 127; Bonsall *v.* Lebanon, 19 Ohio St. 518.

Oregon.—East Portland *v.* Multnoniah Co., 6 Ore. 62.

Pennsylvania.—Philadelphia *v.* Field, 58 Pa. St. 320.

Virginia.—Langhorne *v.* Robinson, 21 Gratt. (Va.) 661.

Wisconsin.—Dickson *v.* Racine, 61 Wis. 545; Teegarden *v.* Racine, 56 Wis. 545; Wright *v.* Forestal, 65 Wis. 341; Meggett *v.* Eau Claire, 81 Wis. 326.

The assessment district may be enlarged by the council, although it has once fixed such district. Trowbridge *v.* Detroit (Mich.), 58 N. W. 368.

Under a statutory provision that the council shall determine the district benefited by an improvement and specify the amount to be assessed, and that the benefits so ascertained shall be assessed against the owners in proportion to the benefit, the council must determine that the district assessed is benefited to the extent of the assessment. Grand Rapids School Furniture Co. *v.* Grand Rapids, 92 Mich. 564, 52 N. W. 1028.

CITY OF ST. LOUIS

v.

BROWN *et al.*

(*Supreme Court of Missouri, March 30, 1900.*)

Widening Streets—Municipal Authority.—The necessity for widening a street is a matter to be determined by the municipal corporation itself, and its decision is not reviewable by the courts.

Same—Condemnation Proceedings—Objections against Commissioner.—The contention that one of the commissioners appointed to assess benefits and damages in condemnation proceedings to widen the street in question was not disinterested, and, therefore, disqualified, was untenable.

Same—Same—Benefit District—Authority of Commissioners.—Under the charter of St. Louis, in such proceedings, until the decision of the commissioners as to the area of the benefit district is finally made and returned into court in the shape of their report filed, such district may be altered by them as further light and maturer reflection may convince them is proper.

Local Assessments—Public Property.*—While it is competent for the law-making power to include public property belonging to a city within the limits of special assessments for public improvements, yet such property is not included unless it is by express enactment or clear implication; and, where the only remedy for the collection of the tax provided by law is of a character inapplicable to such property, such as a proceeding *in rem*, the court cannot provide a remedy, but must conclude that the legislature did not intend such property to be affected by the act.

Same—Same—Leases.—The fact that public property belonging to a city is leased to a private party does not render it subject to a proceeding *in rem*.

Streets—Condemnation Proceedings—Compensation—Constitutional Provisions.—In such proceedings, the plain requirement of the state constitution as to compensation is the law of the case.

Same—Same—Same.—In such proceedings to widen a street, under the constitution of Missouri, providing that "just compensation shall be made to the property owner, the cost of removing the site of a

*See note at end of case.

City of St. Louis *v.* Brown

building, loss of rent, and the reduction in value per foot of the portion of a lot not taken by reason of the taking of the other portion, may all be proper elements of damage.

Case at Bar.—The contention that the commissioners in the proceedings in question acted arbitrarily and not in accordance with the course pointed out for their guidance by law, was not warranted by the evidence.

APPEAL by certain defendants from St. Louis circuit court. *Affirmed.*

Noble & Shields, *Boyle, Priest & Lehmann*, *Lon. O. Hocker*, *Valle Reyburn*, *Bryan*, *Richards & Rozier*, *John H. Drabelle*, and *Collins, Jamison & Chappell*, for appellants.

B. Schnurmacher and *Chas. C. Allen*, for respondent city of St. Louis.

Silas B. Jones, for other respondents.

VALLIANT, J. This is a condemnation proceeding to widen a part of Twelfth street, in the city of St. Louis. In 1898, Twelfth street, from Market street northward to St. Charles street, was 150 feet wide, and from St. Charles street north it was 80 feet wide. The next street north of St. Charles, crossing Twelfth, is Washington avenue, it being a solid block from the one street to the other. The defendant Brown owned a lot extending from St. Charles street to Washington avenue, having a front on each of the three streets; that is, about 200 feet on Washington avenue and St. Charles, each, and 150 feet on the east side of Twelfth street. The purpose of this suit is to widen Twelfth street from St. Charles to Washington avenue, so as to carry the width of 150 feet to that point. To do this it was necessary to cut off 35 feet and 4 inches from the west end of Brown's lot by running a new east line of Twelfth street through his lot from St. Charles to Washington avenue 35 feet and 4 inches east of the old east line of Twelfth street, and also cutting off from lots of other parties on the other side of that street. An ordinance of the city authorizing this proceeding was approved February 12, 1898. At the time

Case Stated.

this ordinance was approved, defendant Brown had entered into contracts under which a large steel and brick mercantile building was to be erected on the lot, which he had already contracted to lease to responsible firms as soon as it should be completed. This building has since, with the change as to location presently to be noted, been completed at a cost, including equipment, of about $325,000. At the date of the ordinance the excavation for the building had been made, some retaining walls, etc., constructed, and the work was ready to progress under the contracts. When the ordinance was in the course of its passage, and when it was in the hands of the mayor for his approval, the defendant Brown exerted all the influence at his disposal to defeat it, and in this he had the co-operation of some of the appellants in this case. But when the ordinance was signed by the mayor, Brown adjusted the proposed building to the emergency, and moved its site back 35 feet 4 inches east from the old line of Twelfth street, and it was then erected, leaving the 35 feet 4 inches to be taken by the city according to the exigencies of the ordinance. If the building had been erected on the original site, it would have left Brown a vacant lot adjoining on the east of 70 feet front on Washington avenue and St. Charles street, for other purposes; but when this change was made it reduced the adjoining lot to 35 feet front. These condemnation proceedings were commenced in due form on the 24th of February, 1898. After process was served on the defendants on April 6, 1898, commissioners were appointed by the circuit court, who, after being sworn, entered upon the duties of their office, and on November 11, 1898, filed their report, wherein it appeared that the total amount of damages awarded all the defendants in the case was $293,150.93, of which they assessed against the city $102,602.85, and the balance, $190,548.08, against private property included in the benefit district. Of these damages the commissioners awarded $159,563.18 to defendant Brown, and assessed him $33,377.50 of the benefits; to defendant Conzelman, who owned property on the other side of Twelfth street, they awarded $96,619

damages; and to defendant Blell, also on the west side of the street, $36,968.75 damages, and assessed him with $8,041.66 as his share of the benefit. In awarding the damages to defendant Brown the commissioners estimated not only the value of the land actually taken, but also the expense he was put to in moving the site of his building to conform to the city's demand, and the delay occasioned thereby in the completion of the house, and the injury to the remaining lot consequent on its reduction in size. The commissioners laid out a large benefit district over which they distributed their benefit assessments, many of the owners of property in which district filed exceptions to the report, all of which were heard and overruled by the court, and those exceptors are the appellants here. The foregoing statement is the case in general outline. The more particular details necessary to be considered will be mentioned in connection with the several points advanced by the council in their briefs.

1. Appellants say there was no necessity for widening Twelfth street. In this opinion they seem to have had the concurrence of defendant Brown, who united his efforts with those of the appellants in an endeavor to prevent the passage and approval of the ordinance. Public costly improvements are not unfrequently opposed by those at whose immediate expense they are to be made, and would often be defeated if left alone to their decision. The desire in such matters often controls the judgment, so that such improvements are frequently made against the will of those immediately to be affected. The determination of such matters, however, is not left to them, but to a presumably more disinterested body; and in this instance the power is in the municipal assembly and the mayor, and its exercise is intrusted alone to their judgment. Whether or not the purpose of the ordinance is good policy is a question for the ordinance-making power of the city government, and the courts have no review of it. When it is proposed to take private property for public use, the individual affected has a right to challenge in court the

Widening Streets—Municipal Authority.

character of the use proposed, and the court will determine whether it be or be not a public use. That is to say, whether or not the use proposed is, in its nature, a public use, is a judicial question; but whether or not the exercise of the authority in the particular case is expedient or politic is a question for the legislative and executive departments of the city government. Lewis, Em. Dom. § 158. A good deal of testimony on the part of exceptors was designed to show that the widening of the street was a mere æsthetic idea, and of doubtful policy; but with that subject we have nothing to do.

Same—Condemnation Proceedings—Objections against Commissioner.

2. It is contended that one of the commissioners (Hummelmann) was not a disinterested judge in the matter, and that for that reason the report should be set aside. This is a serious charge, and the proposition of law on which it is founded needs no citation of authorities to sustain it. The testimony on which the exceptors rely to sustain this charge is that of the commissioner himself, who was called as a witness by some of the exceptors, and who on that point testified, in effect: That he was individually opposed to the scheme of opening Twelfth street, for the reason that, while he thought it a public benefit, yet in the condition of the city treasury he thought that the money required for that purpose could be better used in other directions. That when the ordinance was in the mayor's hands, at the request of Mr. Gehner and Mr. Jones, who was attorney for Mr. Brown, he interested himself to try to have it vetoed. That in furtherance of this object he visited the office of Mr. Collins, one of the attorneys for the Lindell Real-Estate Company, and other exceptors who were opposing the measure, and conferred with him as to the line of argument to be presented to the mayor. At that time he was not acquainted with Mr. Brown; met him first during the sessions of the commission. That, after the report of the commissioners was filed in court, after having looked over the exceptions, in which it was charged that the city ought to be

assessed a larger proportion for the benefits of the public, the witness appeared before the committee of the city council having the matter in charge, and there heard some of the committee say that the city was assessed too much, whereupon he told the committee that, in his opinion, it was only a question for them to say whether or not the city's assessment was too high. The witness was asked if he had not stated to Mr. Collins, upon the occasion above referred to, when he called at his office, that he had been employed by Mr. Jones to represent Mr. Brown in the matter before the mayor, to which he answered that he did not think that he had. Mr. Collins was then called as a witness by the exceptors for the purpose of impeachment, and, over the objections of defendants, stated that upon the occasion referred to Mr. Hummelmann had said that Mr. Jones had employed him to represent Mr. Brown before the mayor. The above is substantially all there was to sustain the charge that this commissioner was not disinterested. The trial court very correctly decided that the charge was not sustained. In the first place, if he had been employed by Brown for that purpose, it was a purpose which Brown had in common with the exceptors,—that is, to defeat the scheme,—and their united efforts were in the same direction. But the evidence does not show any such employment. It must be observed that the exceptors had themselves called Hummelmann as their witness on other questions in the case, and, having obtained his evidence on points that suited them, they had no right to impeach him as a witness. Besides, if he had said what Mr. Collins thinks he said, or if Mr. Collins correctly understood what he intended to say, it would amount to nothing as against the defendants in this case. They would not be bound by an admission that Hummelmann may have made. The fact is, he went before the mayor at the request of Mr. Brown's attorney, and it is very likely he said so to Mr. Collins, and he may have used a form of expression that would indicate that he was employed to do so. But it is very easy to misunderstand

a meaning, or fail to distinguish a shade of meaning, in a casual remark like that. Mr. Hummelmann, it seems, as a citizen, was opposed to this movement. A large sum of public revenue was to be devoted to a purpose which he did not approve; and when a party to be immediately affected, believing that he had influence with the mayor, asked him to aid in defeat of the measure, he consented, and did what he could. But when the mayor signed the ordinance, that was the end of the question as to public policy. The questions arising after that were entirely new issues, as to which a man otherwise qualified would not be disqualified because of his attitude towards the ordinance when it was a matter *in fieri*. In this connection, too, we must not forget that, although the exceptors who are represented by Mr. Collins were not in court when the commissioners were appointed, and therefore could not have objected, yet they were in court constructively, after publication, and apparently in fact early in the sessions of the commissioners; and, if they had any valid objections to urge against a commissioner, they should have made it as soon as they could. They should not have waited until they have seen the result of the commissioners' judgment, and then object.

3. The charter provides: "It shall be the duty of the commissioners to ascertain the actual value of the land and premises proposed to be taken, without reference to projected improvement, and the actual damages done to the property thereby, and for the payment of such values and damages to assess against the city the amount of benefit to the public generally, and the balance against the owner or owners of all property which shall be especially benefited by the proposed improvement in the opinion of the commissioners, to the amount that each lot of said owner shall be benefited by the improvement." Article 6, § 5, Charter of St. Louis. The city ordinance prescribes the duties of the commissioners in the same words down to the clause directing the assessment of benefits when it uses this language: "And the balance against all property within a

district to be ascertained, defined, laid down, and established by the commissioners as the district of property benefited by the proposed improvements; and each lot in said district shall be assessed for the proportionate amount it is benefited in the opinion of the commissioners, so that the aggregate amount assessed against the property in said district shall equal the amount of value and damages awarded for the property taken for the improvement, less the amount assessed against the city for the benefit arising to the public generally for the improvement; * * * provided, further, that before the commissioners shall assess benefits against property in the district established as aforesaid, the city counselor shall give five days' notice in the papers doing the city printing of the establishment of said district and the boundaries thereof, and of the time and place when and where the commissioners will proceed to assess said benefits, and inviting all persons interested to be present; and at said hearing all parties owning or interested in property in said district shall have the right to be heard, and may except to the report of the commissioners before the circuit court when filed." Rev. Ord. St. Louis 1892, § 675. When the commissioners began their labors in this matter, they marked out a district to be assessed for benefits, and the city counselor caused the notice to be published required by the ordinance, and parties interested who desired to be heard came before the commission. But upon final hearing the commissioners reduced the size of the district as originally marked out, omitting a considerable portion of it from the assessments of benefits finally made. This is one of the serious complaints that the exceptors make against the action of the commission. It calls for a construction of the ordinance above quoted in connection with the charter provision. The charter, which is the higher law of the two, directs that these benefits shall be assessed "against the owner or owners of all property which shall be specially benefited by the proposed improvement in the opinion of the commissioners." The ordinance merely directs the mode of procedure for the commissioners.

It is true the ordinance directs the establishment of a district, and afterwards that notice be given. But, if it means that the district is to be unchangeably fixed in the first place, it requires a very important point to be decided before the parties interested are afforded an opportunity to be heard. A man whose property is included in the proposed district is entitled to be heard not merely on the amount of his assessment, but as to his liability to be assessed at all; and if, after the hearing, the commissioners should conclude that his property is not benefited, they should not assess it. And, on the other hand, if the parties notified appear, and demonstrate to the commissioners that the district is too small, their powers would be very inadequate if they could not extend it, and cause notice to be given to property owners within the new proposed bounds. The direction in the ordinance in reference to the notice to be given is in the form of a proviso which qualifies all that has gone before. The charter requires the benefits to be assessed against all the property benefited in the opinion of the commissioners, and excludes the idea that any other property is to be assessed. The ordinance cannot enlarge or take from that requirement, and is not to be interpreted as designed to do so. It does not mean that. There is no decision of the commissioners that is irrevocable by then until they file their report in court. They must proceed in the manner pointed out by the statute, and lay out and define the benefit district; but until their decision is finally made and returned into court in the shape of their report filed, the district may be altered as further light and maturer reflection may convince them is right and just.

4. Included within the boundaries of the district designated by the commissioners as especially benefited are three pieces of property belonging to the city, against which no benefits are assessed. This is one of the exceptions insisted on. On two of these pieces of property are located the city hall, the four courts and jail, and on the third is

the old city hall, still used to some extent for the public offices of the city, but a part of the lot is leased to one Bohle, who has on it a livery stable, the rents for which go into the general revenue of the city, and the whole lot is to be sold under an ordinance, passed in 1895, for that purpose, and the proceeds to be used in the completion of the new city hall. The questions as to the liability of property belonging to counties and cities to taxation, was discussed in City of Clinton *v.* Henry Co., 115 Mo. 557, 22 S. W. 494. It was there held that the constitutional provision exempting such property from taxation applied only to general taxes, and not to special assessments to pay for street improvements; that, as to the latter, such property was subject to the will of the legislature. In the further discussion of the subject, JUDGE BLACK, for the court, in that case said: "In the next place, it is a general rule of law that where, as here, the statute creates a new right, and prescribes a remedy, the statutory remedy is exclusive." And in the same opinion it is said: "According to these adjudications, proceedings to enforce special tax bills are in the nature of proceedings *in rem*, and compulsory payment of the judgment can only be by sale of the assessed property. As public property like that here in question cannot be sold on general or special execution, and as the legislature has provided no other remedy than that of enforcement of the lien, it is quite evident that the statute in question does not apply to or include property owned by a county and used for governmental purposes." 115 Mo., loc. cit. 570, 22 S. W. 496. The principle to be deduced from that decision and applied to this case is that, while it is competent for the lawmaking power to include public property belonging to a city or county within the limits of special assessment for public improvements for public improvements, yet such property is not so included unless it is so by express enactment or clear implication; and, where the only remedy for the collection of the tax provided by law is of a character inapplicable to such property, the court can-

Local Assessments—Public Property.

not provide a remedy, but must conclude that the lawmakers did not intend such property to be affected by the act. To the same effect, also, is Inhabitants of Worcester Co. *v.* Mayor, etc., 116 Mass. 193. Under the charter provision in question, the assessment is made a lien on the property affected, and the only remedy is by enforcement of the lien. If the lawmakers had intended to include property belonging to the city, it would have either been so expressed, or else the mode of payment would have been specified. The fact that a small portion of the property for the time being is leased to Bohle does not affect the principle. The property is not included in the assessment, because it is owned by the city. The law in such case makes no provision for the sale of Bohle's interest. It provides that the assessment shall be a lien on the land, and the remedy is reached through a proceeding *in rem*. The commissioners have assessed against the city as the law requires them to do, the proportion of the damages awarded the defendants, which represents the benefit to the general public that is to be paid out of the general revenue of the city. If, in addition to that, they had assessed the city's property as for benefits, that assessment, if lawful, would also have to be paid out of the city's general revenue, or else let the property be sold, and thus the general revenue would bear a greater proportion of the burden than the law directs. The circuit court correctly ruled on that point.

Same—Same—Leases.

5. It is insisted that the commissioners included in their estimate of defendant Brown's damages overestimates in the value of his property taken, and elements not proper to be included. The language of our constitution is: "That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed,

or the property rights of the owners therein divested." Article 2, § 21. If we will take our constitution at its word, and give effect to it according to its plain meaning, we can have no difficulty in determining the proper measure of damages in such case. Courts lay down general rules for the guidance of the jurors and commissioners which are sometimes serviceable, but any rule that may be laid down must itself be measured by the rule given in the constitution, and any rule that so limits the damages in such case as that the result will be in fact less than just compensation for the injury suffered falls short of the constitutional measure. Such has been the ruling of this court whenever it has spoken on the subject. In Bridge Co. *v.* Schaubacher, 57 Mo. 582, the defendants owned two lots separated by an alley. On the west lot was their brewery, on the east was a malt house, horse-power pump, and pipe through which, passing under the surface of the alley, the brewery was supplied with water. The plaintiff condemned and took the east lot, and contended that the value of that taken was all that it was required to pay for. The court, per WAGNER, J., said: "This by no means confines the assessment to the land actually taken. That may constitute the smallest amount of the injury done. There may be consequential damages which result by reason of the appropriation fairly comprehended within the scope of the law, and this case furnishes a strong illustration. Such is the construction placed on similar statutes in other states." Then quoting with approval from Parker *v.* Railroad Co., 3 Cush. 107, as follows: "We are of the opinion, therefore, that a party who sustains an actual and real damage, capable of being pointed out, described, and appreciated, may sue a complaint for compensation for such damages." And this court, after further discussion, concludes as follows: "This, then, we are induced to think, would be the proper and appropriate measure of damages, *viz.*: The cost and expense of removing the malt house, horse-power pump and pipe to the west of the alley, so that they would be used as effectually and advantageously for running the

brewery as it was run before, to which should be added compensation for the use of the brewery for what time it would have been necessarily idle whilst the change and transfer were being made." In Railway Co. *v.* McGrew, 104 Mo. 282, 15 S. W. 931, the land condemned contained a coal mine, with its machinery, etc., for its operation. The court, per MACFARLANE, J., said: "The damages to be paid are to compensate for the injury to the whole of the property as it was left at the time the appropriation was made, in view of the uses to which the land appropriated was to be applied. * * * It is evident that damages to the property should not be confined to the surface of the land and the machinery in use in the business, but should also apply to the internal arrangement of the mine, and the appliances therein provided for its economical and successful operation, and to all external arrangements which add to its value. If the shaft in use when the condemnation was made could no longer be used, the damage would not be confined to the loss of the shaft, but should include such damage to the internal arrangement of the mine as would result from the necessary abandonment of any part of such appliances, or their readjustment to necessary changes. * * * It is the duty of one sustaining damages by reason of the act of another to use all reasonable exertion to protect himself, and avert, as far as practicable, the injurious consequences of such act. Douglass *v.* Stephens, 18 Mo. 366; Waters *v.* Brown, 44 Mo. 303; 1 Suth. Dam. 148. It was, therefore, defendant's duty to adjust his property to its changed condition as soon as it could reasonably be done, and in such manner as would avert such damages as could be avoided by reasonable endeavors and expense. * * * If the business of the defendant was necessarily interrupted by reason of the appropriation of a portion of his land, compensation should have been allowed for the reasonable value of the use of the mine during the period of such necessary interruption." In Railroad Co. *v.* City of Naperville, 166 Ill. 87, 47 N. E. 734, that court said: "Where land is taken for a public use, the constitution and

statute require that just compensation shall be made to the owner. Unless the owner is made whole, he would not receive the compensation which the constitution guaranties him." Accordingly it was held that the defendant was entitled to damages for the increased cost and interruption of its business, consequent on the opening of the street, and the court added, "This would seem too plain a proposition to consume time in its elaboration." The briefs of counsel are rich in authorities on this subject, but we have quoted sufficient.

It was insisted in the argument, and is still insisted in the briefs of the learned counsel for appellants, that, whatever the requirements of the constitution may be, these commissioners had no higher authority than the charter and the ordinance, which it is argued are more restrictive in their language than the constitution. We think that is a misapprehension of the charter and ordinance. Those instruments were aiming to effectuate the purposes of the constitution in the matter of taking private property for public use, to afford the public the streets and improvements that were required, and to render just compensation to the individual property owner who was compelled to yield his private rights for the public good. The language employed in the charter and ordinance carries that meaning, and it is the correct interpretation. The plain requirement of the constitution is the law of this case. When this ordinance was approved, defendant Brown's contracts were let for the construction of his building at the cost of $252,000. What was his duty under the circumstances? Should he have gone on with the construction, and magnified the damages the city should pay him, either with the determination to resist the enforcement of the ordinance or with a view to make it as costly a proceeding as possible to the city? Or should he suspend all operations until the cause had been carried through the courts, and its result definitely known? Good faith and justice demanded, in the words of

Streets—Condemnation Proceedings—Compensation—Constitutional Provisions.

Same—Same—Same.

this court last cited, that he should use "all reasonable exertion to protect himself, and avert as far as practicable the injurious consequences of such act." If he should wait until it could be settled in court, it would deprive him for an indefinite period of the large capital invested in his enterprise. In either event he had to take the risk of the city's carrying out its purpose for even now the city can abandon the scheme. He took the most conservative and prudent course, gave faith to the city in carrying out its ordinance, and averted, as far as possible, the damages consequent on the city's act. He removed the site of his building eastward 35 feet 4 inches and proceeded with its construction. That move cost him just $7,813.86, for which the appellants say there can be no compensation. Moreover, the change delayed the completion of the building, for which he had tenants waiting at a fixed rental, and he lost by that delay $5,000. If he is to have no compensation here for that loss, then he is damaged to that extent by this act of the city, and he has no other redress. In the language of the Massachusetts case above cited, he "sustains an actual and real damage, capable of being pointed out, described, and appreciated." This court said in the brewery case that, in adition to other items of damages, the defendant should have "compensation for the use of the brewery for what time it would have been necessarily idle while the change and transfer were being made." And in the coal mine case we said : "If the business of the defendant was necessarily interrupted by means of the appropriation of a portion of his land, compensation should have been allowed for the reasonable value of the use of the mine during the period of such necessary interruption." On what principle, then, can we deny the defendant Brown compensation for the loss of the rent of his house, and what it cost him to move it, the figures for both of which he has shown by unquestioned proof? The defendant Brown had a lot 70 feet front on Washington avenue and St. Charles street east of and adjoining the lot on which his building was to have been

erected according to the original plan, but when this building site was moved 35 feet east it occupied 35 feet of that 70-foot lot, and left only a 35-foot lot. The commissioners estimated that a lot 70 feet front, situated as that was, was worth more than twice as much as a lot 35 feet front, and allowed the difference in defendant's damages. There is nothing unreasonable in that proposition. In a vicinity of large mercantile buildings designed for great wholesale establishments, it does not require much expert evidence to convince one that the value per front foot of such a lot may be greatly influenced by the size of the lot. The commissioners seem to have been satisfied that that was the condition here, and we find no fault with the court's ruling in sustaining that view. As to the value of the land taken, there was sufficient and satisfactory evidence to sustain the award of the commissioners. On a mere question of value, depending on conflicting evidence, the circuit court should hesitate to interfere with the commissioners' finding, although, in a proper case, it has undoubtedly the right and duty to do so. A board of commissioners is the tribunal provided by our constitution to do justice in such cases between the city and the citizen. They are selected by the circuit court, and should be men of good judgment and honest repute. They have an advantage that the court, and even the jury, do not have in trying a case. They go upon the land, and make a personal observation and study of it, and its surroundings; besides, they have the benefit of such evidence as parties see fit to bring before them. Assuming, as we must, until the contrary is shown, that the commissioners have given the subject their best, careful and conscientious consideration, their finding on a mere question of value is entitled to great weight with the trial judge when he is hearing exceptions to their report. We see nothing in the award of damages to the defendants that would justify us in holding that the trial court committed error in overruling the exceptions on that ground.

6. The last point advanced by the appellants is that the

Note

city ordinance under which this commission acted is in violation of the fourteenth amendment of the constitution of the United States. Although the exceptions filed in the circuit court specified many grounds for which the exceptors thought the report of the commissioners ought to be set aside, yet this was not one of those grounds. There was no point made in the trial court that the constitution of the United States was being violated, and there is nothing in the point as it is now for the first time here presented. To say that the commissioners in this case acted arbitrarily, and not in accordance with the course pointed out for their guidance by law, is not, we think, justified by the evidence. We have considered all the points advanced in the briefs of the learned counsel for the appellants, and we have found no error in the record. The judgment of the circuit court is affirmed.

Case at Bar.

BRACE, P. J., and ROBINSON, J., concur. MARSHALL, J., not sitting, having been of counsel.

NOTE.

Local Assessments on Public Property.—Local assessments may not be levied against public property used for governmental purposes in the absence of express authority or necessary implication. Polk County Sav. Bank *v.* State, 69 Iowa 24; Mitchelville *v.* Board of Sup'rs, 64 Iowa 541; Worcester County *v.* Worcester, 116 Mass. 193, 17 Am. Rep. 159; State *v.* Hartford, 50 Conn. 89; State *v.* Hotaling, 44 N. J. L. 347; Peck County Sav. Bank *v.* State, 69 Iowa 24; Abercrombie *v.* Ely, 60 Mo. 23; Clinton *v.* Henry County, 115 Mo. 557; People *v.* Austin, 47 Cal. 353.

So streets are not assessable. Cunningham *v.* Peoria, 157 Ill. 499, 41 N. E. 1014; Smith *v.* Buffalo, 90 Hun (N. Y.) 118, 70 N. Y. S. R. 400; Holt *v.* East St. Louis (Ill.), 37 N. E. 927; Walters *v.* Town of Lake, 129 Ill. 23, 21 N. E. 556.

Nor public highways. Mansfield *v.* Lockport, 52 N. Y. Supp. 571; Smith *v.* Buffalo, 90 Hun (N. Y.) 118; Reinhardt *v.* Buffalo, 39 N. Y. S. R. 304; Omaha *v.* Megeath, 46 Neb. 502.

Local assessments cannot be levied on land used for canal purposes. Mansfield *v.* Lockport, 52 N. Y. Supp. 571.

Note

Nor against public school property. Louisville *v.* Leatherman, 99 Ky. 213, 35 S. W. 625; Hartford *v.* West Middle Dist., 45 Conn. 462; Toledo *v.* Board of Education, 48 Ohio St. 83; Board of Improvements *v.* School Dist., 56 Ark. 354; Abercrombie *v.* Ely, 60 Mo. 23; Poock *v.* Ely, 4 Ohio C. C. 41.

But public school lands are assessable where the uses which are made of them are not public entirely. Ft. Smith School Dist. *v.* Board of Improvements, 65 Ark. 343, 46 S. W. 418.

The Illinois decisions hold that in the absence of special exemption therefrom property held for a public use is not exempt from local assessments, even though exempted from taxation generally. Adams County *v.* City of Quincy, 130 Ill. 566; Illinois, etc., Canal *v.* Chicago, 12 Ill. 403; Higgins *v.* Chicago, 18 Ill. 276; Chicago *v.* Colby, 20 Ill. 614; Peoria *v.* Kidder, 26 Ill. 351; Scammon *v.* Chicago, 42 Ill. 192; Wright *v.* Chicago, 46 Ill. 44; McLean County *v.* Bloomington, 106 Ill. 209; Taylor *v.* People, 66 Ill. 322; Craw *v.* Tolono, 96 Ill. 255. See also Hassan *v.* Rochester, 67 N. Y. 528.

But not against a custom-house and postoffice owned by the United States. Fagan *v.* Chicago, 84 Ill. 227.

See also as to local assessments on property of the United States, Chicago, etc., R. Co. *v.* Davenport, 51 Iowa 451; Baltimore *v.* Green Mount Cem., 7 Md. 517.

Local assessments cannot be levied against the property on which a state insane hospital is located. Baltimore County *v.* Maryland Hospital, 62 Md. 127.

County property is not assessable for local improvements. Big Rapids *v.* Supervisors (Mich.), 58 N. W. 358.

Public property is exempt, under the Texas constitution, from both taxation and local assessments. Harris County *v.* Boyd, 70 Tex. 237.

Real estate of reform school used by city and state cannot be sold for local assessment. Louisville *v.* McNaughten (Ky.), 44 S. W. 380. See also Taylor *v.* People, 66 Ill. 322.

Public property cannot be sold to collect a local assessment. Lowe *v.* Howard County Comrs., 94 Ind. 553. And such reason has been assigned as sufficient for denying the liability of municipal property to local assessments. Paine *v.* Spratley, 5 Kan. 525; City of Leavenworth *v.* Laeng, 6 Kan. 274, *Compare In re* Opening of Berks St., 12 W. N. C. 10; Philadelphia *v.* North Pa. R. Co., 4 Pa. Dist. Rep. 451; *In re* Howard St., 142 Pa. 601; People *v.* Clark Co. Sup'rs. 50 Ill. 213.

Local assessments may be levied against a city's real estate. Scammon *v.* Chicago, 42 Ill. 192; Dick *v.* Toledo, 11 Ohio C. C. 349. Public parks belonging to a city are not exempt. *In re* Church Street, 49 Barb. (N. Y.) 455; Scammon *v.* Chicago, 42 Ill. 192.

IRON MOUNTAIN R. CO. OF MEMPHIS

v.

CITY OF MEMPHIS *et al.*

(Circuit Court of Appeals, Sixth Circuit, July 5, 1899.)

Occupancy of Streets by Railroads—Enforcement of Contracts by Municipalities—Due Process of Law—Federal Jurisdiction.—Action by the legislative council of a municipal corporation under its general power of controlling the streets and of enforcing contracts with reference to their occupancy by individuals or corporations, is action by a state within the operation of the first section of the fourteenth amendment of the federal constitution, prohibiting a state from depriving any person of property without due process of law.

Same—Same—Same—Same—Injunction.—Where a municipal corporation, under its authority to control its streets, passes a resolution declaring the forfeiture of a contract with a railroad company, by virtue of which the company is occupying its streets, and its intention to use its police force in ousting the company from such occupancy, the latter is entitled, under the federal jurisdiction act of 1887-1888 and the fourteenth amendment of the federal constitution, to an injunction restraining the enforcement of such resolution.

Same—Same—Interstate Commerce.—A resolution of the legislative council of a city declaring the forfeiture of a contract for the occupancy of the streets by a railroad company, and the intention to enforce such forfeiture, unless the company complied with a provision of the contract binding it not to impose rates discriminating against the city, is merely an attempt to enforce a contract right, and not invalid as a law attempting to regulate interstate commerce, although the company, under the contract, had bound itself not to discriminate against the city in regard to interstate commerce.

Ordinances as Laws—Impairing Contract Obligations.—An ordinance, or a resolution having the effect of an ordinance, of a municipal corporation, enacted under its general power of controlling the streets, as a state agency, declaring that a railroad company has forfeited its right to occupy the streets under a contract with the municipality, and declaring that the latter will oust the company from such occupancy if the breach of the contract continues 50 days, is, after such period has elapsed, a law within the meaning of the

Iron Mt. R. Co. of Memphis *v.* City of Memphis

provisions the federal constitution declaring, in substance, that no state shall pass any law impairing the obligation of contracts.

Same—Same.—Such ordinance or resolution, after it has become operative by the lapse of the time specified, if founded on a non-existent breach of the contract by the railroad company, is a law impairing the obligation of a contract within the meaning of section 10, art. 1, of the federal constitution; and in an action to enjoin the municipality from enforcing the forfeiture declared by the ordinance or resolution, by ousting the railroad and resuming possession of the streets, the fact that the application of such constitutional restriction depends partly on questions of fact is no reason for holding that the case is not one in which it may be relied on.

Impairment of Federal Jurisdiction—Injunction.—Where a federal court has jurisdiction of the whole controversy, it should enjoin subsequent suits in the state courts which constitute an impairment of such jurisdiction.

APPEAL by complainant and cross appeal by city from the circuit court of the United States for the Western District of Tennessee. *Reversed for refusal to grant complainant further relief.*

These are cross appeals in a suit in equity begun by the Iron Mountain Railroad Company of Memphis against the city of Memphis and the members of the legislative council of that city. The object of the bill was to enjoin the city of Memphis and its legislative council from attempting to enforce a forfeiture of the rights of the complainant under a contract made between the complainant and the predecessor of the corporation of the city of Memphis, the taxing district of Shelby county, whereby the right was given to the complainant to occupy Kentucky avenue within the taxing district for one mile with a double-track railroad for the term of 55 years, subject to certain conditions precedent and subsequent. The bill further prayed that the legislative council and the citizens of Memphis, by permanent mandatory injunction, might be required to cacel and annul the resolution of March 25, 1898, declaring the forfeiture.

Case Stated.

Complainant avers in its bill: That it was chartered and organized in 1886 under the laws of the state of Tennessee

as a railroad corporation and a common carrier of freight and passengers, having its principal office in the city of Memphis, for the purpose of constructing, owning, and operating a railway in Shelby county and the city of Memphis, with the right to run its line along or across the streets and alleys of the city, and along and across the public roads of Shelby county, and over private property. That on the 13th of November, 1886, for the purpose of carrying out its corporate objects, it entered into a contract with the taxing district of Shelby county. That thereby the taxing district granted to the complainant the right to enter upon Kentucky avenue at the southern boundary of the taxing district, and to lay down, maintain, and operate with locomotive power a double-track railroad on either side of the central line of the avenue, the tracks not to exceed 13 feet from center to center, and to be in the middle line of the street. That the term granted was 55 years. That the complainant agreed to pave the street from curb to curb from the point where its track entered the street to the point where it left the street. That complainant agreed to build a freight depot within 5 years after it should begin the use and enjoyment of the privileges granted, and to complete the paving of Kentucky avenue in 18 months. That sections 15 and 16 of the contract were as follows: "(15) It is further agreed that said second party will at no time during the term of this contract unequally discriminate against the first party or its citizens in its rates for the carriage of freight and passengers to and from the taxing district. (16) It is further agreed and understood that the original and continued performance of each and every stipulation hereof on the part of said second party is a condition of the grant herein contained, and that failure of said second party to perform same, or any part thereof, or its failure to perform the same within the time herein stipulated, or to exercise the privilege herein granted within the time herein stipulated, shall, at the option of the said first party, work an entire forfeiture and cessation of all rights and privileges in said second party under this contract, and the

first party may, in the event aforesaid, at once retake and resume its possession and control of the said premises, as if this contract had never been made. But it is agreed that such forfeiture shall not be enforced unless said second party shall for thirty days after notice neglect to perform such obligations, or to exercise such privileges."

The bill further avers that on the faith of the contract complainant purchased a large amount of property in the city of Memphis for its depot grounds and other purposes, and made large and expensive improvements, all of which involved an expenditure of upward of $330,000; that it constructed its main tracks and side tracks in accordance with its contract, graded and paved Kentucky avenue from its depot grounds as far south as its line extended; that Kentucky avenue had been entirely unpaved and unused before this, and had a bayou crossing it almost at right angles, with no bridge; that complainant, besides paving the street, constructed a culvert and bridge over the bayou, costing $30,000; that upon the improvements thus made by it complainant has paid taxes aggregating a large amount, to the city of Memphis, since the contract was made. The bill further avers that on the 7th day of October, 1897, the Memphis Freight Bureau, an association of the merchants of Memphis, presented to the legislative council of that city a complaint alleging that the St. Louis, Iron Mountain & Southern Railway Company was the successor to the Iron Mountain Railway Company, the complainant, and as such successor became liable to the conditions of the occupancy of Kentucky avenue; that the St. Louis, Iron Mountain & Southern Railway Company had, in violation of section 15, unequally discriminated against the city of Memphis and its citizens in rates published and assessed on merchandise and commodities shipped from Memphis to stations on the lines of said St. Louis, Iron Mountain & Southern Railway Company in the state of Arkansas and Missouri, and on commodities shipped from said stations to the city of Memphis; that the petition prayed the legislative

council to give notice to said St. Louis, Iron Mountain & Southern Railway Company that, unless the said alleged discriminations complained of were corrected within the period of 30 days, a forfeiture of its rights and privileges under the contract with the city would be at once declared; that the St. Louis, Iron Mountain & Southern Railway Company was a foreign corporation under the laws of the state of Missouri and Arkansas, and was not the successor of the complainant, and had not succeeded to the burdens or benefits of the contract between the complainant and the city of Memphis; that the St. Louis, Iron Mountain & Southern Railway Company appeared by its freight agent and solicitor before the legislative council of Memphis, denied that any rates which it had established on freight originated at or destined to Memphis, which it carried over its lines, were unreasonable, or resulted in an unequal discrimination against the city of Memphis or its citizens, and had contended that the rates complained of were interstate rates; that the legislative council had, therefore, no power to fix or control them, and that any question connected therewith could be considered only by the interstate commerce commission or by the federal courts in proper proceedings instituted therein; that, notwithstanding these objections, the legislative council proceeded with the hearing of the petition, and on the 9th day of December passed resolutions declaring that the complainant had been and was unequally discriminating against the city of Memphis and its merchants in rates of freight, and demanded that within 50 days thereafter it should revise and readjust its rates to and from the city of Memphis so as to obviate the inequality and discrimination; that the time of 50 days was, on February 4, 1898, extended 30 days; that on February 23, 1898, it was extended for an additional 30 days, and on the 25th of March, 1898, the legislative council passed the final resolution upon which the case turns, a copy of which appears below.

Plaintiff further avers that it was never called upon to appear before the legislative council to defend or explain any

rates which it had put into effect on its railroad, and that no complaint was ever made that any rates charged for transportation over its road were unreasonable or unequally discriminatory; that, though all the proceedings were directed against the St. Louis, Iron Mountain & Southern Railway Company, the resolutions passed by said legislative council were, however, directed to, and were sought to be made effective against, complainant, because of alleged discrimination in rates which are interstate, which rates complainant did not make or promulgate, and for which complaintant was in no way responsible. The bill further avers that the resolutions passed by said legislative council were so vague, indefinite, and uncertain that no party to whom they were directed could know or ascertain therefrom what rates should be changed, or the extent of the changes to be made. The bill further avers: "That it is the declared intention of the defendants, if the said resolutions were not complied with within the time therein mentioned, to enforce against your orator, the Iron Mountain Railroad Company of Memphis, in pursuance of said resolution of March 25, 1898, the forfeiture of all rights and privileges granted to it under the contract hereinbefore mentioned, and hereto attached, marked 'Exhibit B,' and your orator avers that any such enforcement of forfeiture on the part of the city of Memphis or its legislative council will result in immediate incalculable and irreparable loss and damage to your orator. Your orator avers that it has a vested property right in said contract; that upon the faith of said contract your orator has expended large sums of money in property, fixed and immovable, in said city of Memphis; and that an enforcement of forfeiture of said contract by said legislative council or by the said city, and a dispossession of your orator of its said property, would involve direct, immediate, and irreparable injury to said vested property rights of your orator. Your orator is advised and charges that it is the intention of the defendants, having thus declared a forfeiture of said contract as aforesaid, to attempt, through its police and other officers, by force to

oust your orator from the possession of its property in the city of Memphis, and to deprive it of the use of the same, and prevent it from exercising the rights which are vested in it by its charter as a railroad corporation of the state of Tennessee, and the rights which are vested in it under said hereinbefore mentioned contract with the taxing district of Shelby county and said city of Memphis. Your orator avers that the demand made by the legislative council and the city of Memphis that your orator shall reduce rates on shipments made beyond your orator's line of railroad is unreasonable, unjust, and oppressive, and is one which your orator has not the power to comply with, even if it had a desire so to do. Your orator is informed and believes that no rates which are or have been put into effect by the Missouri Pacific Railroad Company, or by the St. Louis, Iron Mountain & Southern Railway Company, are unreasonable or unjust, or unfairly discriminate against Memphis or its citizens, but, on the contrary, your orator avers that the rates which have been put into effect by the said last-named companies are fair and just, and do not discriminate either against Memphis or its people. Your orator avers that said declaration by said legislative council of forfeiture of said contract, or any attempted enforcement of same, will, at the expiration of the time mentioned in said resolution of March 25, 1898, subject your orator to a multiplicity of suits with the city of Memphis, and especially suits by abutting property owners along the line and on both sides of Kentucky avenue and contiguous thereto; that in said suits it would be claimed that your orator was occupying said Kentucky avenue and other streets and other property of said city without authority of law, and to the damage of said abutting property owners, and that the action of said legislative council in the forfeiting of said contract would be claimed in said suits to be conclusive of the unlawful occupancy of said streets by your orator; that your orator would be compelled in each of these suits to attack and call into question the injustice and illegality of the action of the defendant in declaring said forfeiture; that vast

expense would be imposed upon your orator in the preparation and defense of the multitude of suits which would grow out of the situation, and that the burden of expense thus imposed upon your orator might and probably would be so great as to overtax its financial means, and make it impossible for your orator to defend its rights, and thus your orator would, in the loss of its property, sustain serious and irreparable damage." In the eighth paragraph of the bill the complainant, without admitting that discriminatory rates imposed either by itself or by the St. Louis, Iron Mountain & Southern Railway Company, would constitute a ground of forfeiture under section 16, denies that unequal discriminating rates have been imposed by either company.

Complainant further avers that, notwithstanding the fact that the contract makes no provision for a forfeiture of the same, because other companies, which are on their own line, fix rates which are unreasonable and discriminatory, the legislative council adjudged complainant guilty of a violation of the contract on the 13th of November, 1886, in a proceeding to which it was not a party, before a tribunal not a court, which was one of the parties to the contract in controversy, and to be benefited thereby; and the legislative council upon this adjudication declared a forfeiture of complainant's rights under said contract, and threatened forcibly to dispossess complainant of the property to the use of which it is entitled under said contract, and thus to impose upon complainant great and irreparable loss and damage. Complainant avers that the declaration of the forfeiture and the ousting of complainant from the possession of the property would be in violation of section 1 of the fourteenth amendment to the constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Complainant avers that the acts of the legislative council in declaring a forfeiture and in ousting complainant from the possession of the property under the resolution of March 25, 1898, and

any action taken in the enforcement thereof, are and would be in violation of section 10, art. 1, of the federal constitution, providing that no state shall pass any law impairing the obligation of the contracts. Complainant further avers that the freight rates complained of are interstate freight rates, and that the action taken by the legislative council is an attempt to regulate and control commerce between the states of Tennessee and Arkansas and Missouri, and that such action is contrary to section 8, art. 1, of the constitution of the United States, which provides that congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes, and that such action is therefore void. By paragraph 11 complainant avers that the matter in controversy exceeds in value $5,000, and that the case is one arising under the constitution and laws of the United States. The prayer of the bill is that an injunction may issue out of this court restraining and enjoining said city of Memphis and said legislative council from further proceeding in the matter complained of in the petition filed by said Memphis Freight Bureau, and from in any way enforcing or attempting to enforce forfeiture as against complainant of the before-mentioned contract, or of any rights and privileges now enjoyed by it under the contract. Appended to the bill as exhibits are the contract with the railroad company, the complaint of the freight bureau, and the various resolutions of the legislative council. The resolution of December 9, 1897, after reciting the petition of the Memphis Freight Bureau, referring to the fifteenth section of the contract, stated: "And whereas, a full hearing of the matters involved in said petition, and of the defenses thereto made by said railroad company, has been had, in which hearing the said railroad company was represented by its attorneys and officers, therefore, be it now resolved: That after full investigation and consideration of the matters and charges contained in said petition of the Memphis Freight Bureau, this council finds and adjudges that said railroad company has been and is unequally discriminating against

the city of Memphis and its merchants in the rates of freight established by it to and from said city; and, be it further resolved: That said railroad company be and it is hereby called upon within fifty days from this date to revise and readjust its rates of freight to and from the city of Memphis, to the end that the inequalities and discrimination in said rates against the city of Memphis may be obviated and determined. Be it further resolved, that the secretary of the council be instructed to immediately transmit an authenticated copy of these resolutions to said railroad company, to the end that said railroad company may have full opportunity within the period aforesaid to revise and readjust its rates, as herein called upon to do; and that until the expiration of said period further action in the premises will not be taken by this council." After two extensions the resolution upon which the case turns was passed. It reads as follows: "Whereas, the railroad companies have offered in full settlement of this matter to revise and readjust their tariff of rates between Memphis and certain points upon their lines, but they declined to revise their rates to and from the other points on their lines; and whereas, this council finds that as between these last-named points and the city of Memphis the said railroad companies unequally discriminate against the city of Memphis and its citizens in rates for the carriage of freights: Therefore, be it resolved by the legislative council of the city of Memphis, that unless the Iron Mountain Railroad Company of the city of Memphis, the Missouri Pacific Railroad Company, and the St. Louis, Iron Mountain & Southern Railroad Company shall, on or before April 10, 1898, revise and readjust their rates for the carriage of freight between the city of Memphis and all points on their lines so as not to unequally discriminate against the city or its citizens, then it is hereby declared that such a failure on the part of said companies, or any of them, shall work an entire forfeiture and cessation from and after April 10th of all rights and privileges granted by the city of Memphis to the Iron Mountain Railroad Company of Memphis, under the

contract of November 13, 1886, and the city will then retake and resume its possession and control of said premises and rights and privileges in said contract granted, as if said contract had never been made."

A motion for a preliminary injunction was made, but before it was heard the defendant filed an answer. The answer first averred that the complainant had lost its rights in Kentucky avenue by permitting a foreign corporation to use the tracks, and by not itself using the privileges conferred by the contract. The answer then sets out in considering detail the alleged unequally discriminating rates charged by the St. Louis, Iron Mountain & Southern Railway Company. It further avers that the complainant and the St. Louis, Iron Mountain & Southern Railway Company are both corporations, the stock of which is all owned by the Missouri Pacific Railroad Company, and the latter company names all the directors and managers of both companies; that the Missouri Pacific Company and the St. Louis, Iron Mountain & Southern Company have adopted the contract between the city and the complainant company, and by using the franchises therein have subjected themselves to the liabilities attached to the grant. The answer further avers as follows: "Defendants deny that any irreparable loss or damage will ensue to the complainant from the resolution of March 25, 1898. The only effect of that resolution was to declare that, if discrimination existed on and after April 10, 1898, then such failure should work a forfeiture of the privileges granted to the complainant. * * * Defendants deny that a dispossession of the complainant of said privileges would work an irreparable injury to any property rights of said complainant therein. Defendants deny that they have any intention to disturb the vested rights of the complainant. Their only purpose is to compel the complainant and its privies to fulfill their undertakings and obligations to the city of Memphis and its citizens. * * * Defendants deny that the request for a revision of rates is unreasonable, unjust, or oppressive, or that com-

plainant is without power to comply therewith. Defendants deny that the rates now in force are not unreasonable and unjust; and they deny that said rates do not discriminate against the city and its citizens. Defendants deny that the resolution of March 25, 1898, will subject the complainant to a multiplicity of suits. In point of fact, the occupation by complainant of said street prior to the passage of said resolution was unlawful, as hereinbefore set forth, and, if a multiplicity of suits result, it is no fault of these defendants. * * * Defendants deny that the city has no right to forfeit privileges granted by said contract because of discriminations on the line of the St. Louis, Iron Mountain & Southern Railroad Company, and defendants deny that they have threatened to forcibly dispossess the complainant of any of its property, or vested rights, or to impose an irreparable loss upon complainant. Defendants deny that any action of theirs, past or contemplated, or any threat upon their part, has been or would be in violation of section 1 of the fourteenth amendment of the constitution of the United States, or any other provision of the constitution. They deny that the acts of the council, past or contemplated, with respect to the complainant, or its property, are in violation of section 10, art. 1, of the constitution of the United States. Defendants deny that the discrimination complained of is wholly upon interstate commerce. In point of fact the discrimination extends over the property of complainant within the state of Tennessee. Defendants deny that any past or contemplated action upon their part is an attempt to regulate or control commerce between the states, or that such action was or would be in contravention of section 8, art. 1, of the constitution of the United States; and defendants deny that this is a suit arising under the constitution and laws of the United States, or that there is any federal question involved herein."

At the hearing upon the preliminary injunction, evidence was filed as to the discrimination in rates. The court sustained the motion in so far as to grant a temporary injunc-

tion enjoining the city of Memphis and the legislative council from proceeding to enforce the forfeiture declared by the resolution of the legislative council March 28, 1898, against the defendant company, through its police or other officers, or by force to oust the plaintiff company from the possession of its property in the city of Memphis, or to deprive it of the use of the same under its contract with the city, or its charter, otherwise than by the judgment of a court of competent jurisdiction, as provided by law.

Subsequently the complainant tendered a supplemental bill, in which it averred that since the beginning of its injunction suit, the city of Memphis had filed a suit in ejectment against the complainant seeking thereby to have its rights in Kentucky avenue judicially forfeited, and it ousted from the street. Other averments were as follows: "Your orator avers and shows that all of the questions of law and fact above specified are raised and pending in this cause before this honorable court, and that they constitute the controversy between the defendants and your orator of which this honorable court has taken cognizance, and of which it has exclusive jurisdiction. Your orator further avers that, if the said city of Memphis and the other defendants herein shall be permitted to prosecute its said suit in the said state court, your orator will suffer great and irreparable injury in this: that if the judgment against your orator in said suit in ejectment shall be rendered in said state court, your orator will be harassed by a multitude of suits which will inevitably be brought by citizens whose property abuts upon the streets used by your orator under said contract, who will predicate their claims upon the fact that a court of law has declared the possession of your orator in said streets to be unlawful. * * * Your orator further avers and shows that the many issues involved in said original cause in this court and in the said suit in ejectment in the state court include questions of law and fact of such a nature as to render it impracticable to have the same fairly and fully considered and determined

by a jury; that any investigation of the question of reasonable or unreasonable rates, or of whether certain rates are or are not discriminatory, will require the examination of numerous and implicated tariff rates, and a consideration of many natural and artificial conditions. * * * Your orator avers that a just and fair examination and decision of these complicated questions of rates cannot be secured through a trial by jury in an action at law, but that said issues ought in justice to be tried by a court of chancery, the machinery of which is alone suited to the investigation of such complicated questions."

The prayer of the supplemental bill was as follows: "Wherefore your orator, averring that the state court has on jurisdiction to take cognizance of, hear, or determine any of the questions submitted to it in said suit in ejectment, but that the sole and exclusive jurisdiction is vested in this court, and averring that it will sustain serious and irreparable loss, injury, and damage unless the said city of Memphis shall be enjoined from further prosecuting its said ejectment suit in said state court, humbly prays this honorable court to grant its writ of injunction restraining and enjoining the said city of Memphis and the other defendants herein from further prosecuting said suits in said state court, and that pending a hearing for said injunction your orator may have a temporary restraining order embracing the relief herein prayed."

The court refused to permit the supplementary and auxiliary bill to be filed, and denied the prayer for preliminary injunction. Subsequently the plaintiff applied for additional time in which to take proof, the time under the rules having expired. The court denied this permission substantially on the ground that upon the face of the bill and answer, the complainant was entitled to the perpetual injunction in the form in which the preliminary injunction had been granted, to wit, an order restraining the city and legislative council by use of the police force or otherwise from forcibly ousting the complainant from occupation of Kentucky avenue under the resolution of March 25, 1898, because said action would

be an attempt to take the property of the railroad company without due process of law, and that complainant was entitled to no other relief. The rulings of the court in refusing the preliminary injunction prayed for in the supplemental bill and in declining to allow the supplemental bill to be filed, and in refusing to grant a permanent injunction enjoining the city from continuing the prosecution of its ejectment suit in the state court were all assigned by the complainant for error. By cross appeal the city challenges in this court the jurisdiction of the circuit court to issue the injunction which it did issue, contending that the action of the legislative council was not an attempt to take property of the complainant without due process of law.

L. McFarland and *A. G. Cochran*, for appellants.

John H. Watkins and *Luke E. Wright*, for appellees.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The first question which arises on this record is whether the action taken and proposed to be taken by the city was an attempt by the state to take the property of the complainant without due process of law. Kentucky avenue was one of the streets of the city of Memphis. Title to the easement or the fee in the street was held in trust by the taxing district of Shelby county and the city of Memphis for the use of the public at large. The power to contract with reference to the street, and the power to exercise control over it, was originally vested in the legislature, and the city derived the power to control the street and to contract with reference to its use by delegation from the state through its legislature. JUDGE DILLON, in his work on Municipal Corporations (volume 2, § 656), states this principle as follows:

"Public streets, squares, and commons, unless there be some special restriction, when the same are dedicated or acquired, are for the public use; and the use is none the less for the public at large, as distinguished from the municipality,

because they are situate within the limits of the latter, and because the legislature may have given the supervision, control, and regulation of them to the local authorities. The legislature of the state represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the weight of more recent judicial opinion) to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places. 'To the commonwealth here,' says CHIEF JUSTICE GIBSON, 'as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads laid out by the authority of the quarter sessions,' "—citing O'Connor *v.* Pittsburg, 18 Pa. St. 187.

Section 47 of the charter of the city of Memphis, enacted by the general assembly of the state, is as follows:

"The general council shall have power to regulate the laying of railroad iron and the passage of railroad cars through the city."

Section 50 of the charter is as follows:

"The general council shall have power to improve, preserve and keep in good repair the streets, sidewalks, public landing and squares of the city; to open and widen streets, and to lay off new streets and alleys necessary, always paying the party injured therefor; and by unanimous vote to close up, transfer or sell any street, alley or public easement; and shall have and exercise complete and perfect control over all the streets, squares and other property of the city, whether lying within or without the limits of the city. They shall also have the power to compel the owner or owners of any ground or private alley to keep the same clean; or, if necessary thereunto to compel him or them to improve the same, and remove any nuisance from the same."

In the control of the streets, in contracting with reference to their use, in the declaration of nuisances upon the streets, in the resumption of the complete control over the streets after

the termination of easements in the street enjoyed by any private person or corporation, the city is acting as trustee, not alone for the citizens and residents of the city, but as a trustee for the public at large, and is exercising a power delegated to it by the state, and in the exercise of such a power is necessarily, therefore, a state agency. That this is true in Tennessee appears from the case of Williams *v.* Taxing District, 16 Lea 531. That case presented the question whether the taxing district of Shelby county was liable in damages to the person whose property was injured by a failure to keep the streets in repair. Section 19 of the act creating it provided that the taxing district should not be liable for damages or injuries to person or property by reason of defects in the street under its control. It was contended that this act was in violation of the constitution (article 1, § 17)of the state of Tennessee, which provided:

"That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner and in such courts as the legislature may, by law, direct."

It was held that, because such suits were really against the state of Tennessee, it lay within the power of the legislature to grant or deny the right to private persons to bring suits for neglect to repair streets by a municipal corporation. JUDGE COOPER, in delivering the opinion, said:

"By the common law the citizen had no remedy against a county for an injury caused by the neglect of the county to keep the public roads in good repair. And such is the state of the law to this day, although the county is a municipal corporation. Wood *v.* Tipton Co., 7 Baxt. 112; White's Creek Turnpike Co. *v.* Davidson Co., 14 Lea 73. The reason is that the county, in its municipal capacity, is only an arm or instrument of the state to carry out its sovereign prerogative in opening and keeping up public roads, and the legislature may give it only such powers as it deems

best, and limit its liabilities accordingly. * * * The current of authority, while recognizing the exemption of counties from liability for injuries caused by failing to keep the public roads in repair, nevertheless holds an incorporated town liable for a similar injury occasioned by neglect of its public streets. The reason of the distinction is that municipal corporations of this class, while still arms of the state government, are more complete entities, and are enjoined and given the power to maintain the streets in a safe condition.

The ratio *decidendi* of the court's conclusion is that the legislature may give to a corporation such power as it chooses, but that in doing so it only vests it with the power of the state as a state agency. When, therefore, the taxing district of the county of Shelby made a contract with the complainant company by which it secured to that company for 55 years occupancy of Kentucky avenue, it was acting as an agent of the state, and as a trustee of the public at large. When now the city of Memphis, as the successor of the taxing district, comes to assert the rights secured to it by that contract, it is asserting the rights of the state and of the public at large as a state agent.

Among the prohibitions of the first section of the fourteenth amendment to the constitution of the United States is this: "Nor shall any state deprive any person of life, liberty or property without due process of law." The first question presented is whether action by the legislative council of the city of Memphis under its general power of controlling the streets and of enforcing contracts with reference to their occupancy by individuals or corporations, is action by a state within the operation of this amendment. There can be little doubt upon this point. In *Ex parte* Virginia, 100 U. S. 339, MR. JUSTICE STRONG, speaking for the supreme court, said:

Occupancy of Streets by Railroads—Enforcement of Contracts by Municipalities—Due Process of Law—Federal Jurisdiction.

"We have said the prohibitions of the fourteenth amendment are addressed to the states. * * * They have ref-

erence to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it."

The principle was applied in *Ex parte* Virginia to the judge of a county court who had excluded jurors from a jury in a state court on account of race, color, and previous condition of servitude. It was followed and restated in Neal *v.* Delaware, 103 U. S. 370–397, where the particular act under investigation was the act of the officers charged by the law with the selection of jurors. This was held to be state action, and in so far as the officers excluded from the jury men on account of their race it was held to be a violation of the fourteenth amendment. The same principle is laid down in the Civil Rights Cases, 109 U. S. 3–17, 3 Sup. Ct. 18. In Yick Wo *v.* Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, the ordinance of a municipal corporation with reference to regulating the carrying on of public laundries which conferred arbitrary power upon the municipal authorities to give or withhold consent to the carrying on of such business was held to be state action violative of the guaranty of protection in the first clause of the fourteenth amendment. In Missouri Pac. R. Co. *v.* Nebraska, 164 U. S. 403, 6 Am. & Eng. R. Cas., N. S., 157, 17 Sup. Ct. 130, it was held that the order of the board of transportation acting under a state law,

requiring a railroad corporation to furnish land for the erection of a grain elevator to a private person, was a taking of private property by the state in violation of the fourteenth amendment. In Smith *v.* Ames, 169 U. S. 466, 10 Am. & Eng. R. Cas., N. S., 1, 18 Sup. Ct. 418, and in Reagan *v.* Trust Co., 154 U. S. 362, 58 Am. & Eng. R. Cas. 670, 14 Sup. Ct. 1047, action by a state railroad commission in the regulation of rates under a statute authorizing regulation generally was held to be state action, and within the fourteenth amendment, if it resulted in depriving a person of his property without due process of law. The principle was approved in Scott *v.* McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, and applied to the action of a state court as an agency of the state. It was held that the judgment of the highest court of a state by which a purchaser, at an administrator's sale under order of a probate court, of land of a living person, who had no notice of its proceedings, was held to be entitled to the land as against him, deprived him of his property without due process of law, contrary to the fourteenth amendment of the constitution. In Chicago, B. & Q. R. Co. *v.* City of Chicago, 166 U. S. 226, 7 Am. & Eng. R. Cas., N. S., 26, 17 Sup. Ct. 581, the principle was reasserted in a case which involved the question whether the supreme court of the state had by its decision deprived a citizen of his property without due process of law in a condemnation proceeding.

Same—Same—Same—Same—Injunction.

It necessarily follows that if, in the case at bar, the resolution of the legislative counsel, under its authority to control the streets, has deprived, or was about to deprive, the complainant of its property without due process of law, complainant was entitled to a judicial remedy, under the United States circuit court jurisdiction act of 1887–1888 and the fourteenth amendment, against such action. The averment of the bill was that the council passed a resolution of forfeiture, and of the declaration of its purpose to take possession of the street, intending to use the police force in enforcing such

declaration. It could only use the police force in its governmental capacity as a branch of the state government. We concur with the court below in the opinion that the answer does not deny the charge of the bill that the intention of the legislative council in passing the resolution of March 25, 1898, was to carry out that resolution, and put the city in possession by use of its police power. The denial of the defendants possibly directed to the specific charge of the bill that they intend to use the police force to enforce the forfeiture declared, and oust complainant from the street, is as follows: "Defendants deny that they have threatened to forcibly dispossess complainant of any of its property or vested rights." As the answer denies that complainant had any property or right in the streets, this cannot be regarded as a denial at all of the charge. A similar denial that they have any intention to disturb the vested rights of the complainant is equally defective and insufficient. The court below held, and, we think, rightly, that whether the action of the railroad company with reference to rights was a breach of the condition, and justified a forfeiture or not, an attempt by the city, through a resolution by its legislative council, declaring the forfeiture on that account, and the forcible taking possession, would together constitute the taking of property of the railroad company without due process of law.

It is argued that the resolution was in exact accord with the stipulation of the parties, and in the language of the condition itself contained in the contract by which the railroad company entered upon the occupancy of the street. It is contended that it left to the city the right to declare such forfeiture at its option, and upon the declaration of such forfeiture to resume possession of the street. The language of the conditions of the contract and of the forfeiture clause are like an ordinary condition subsequent in any lease or deed conveying an estate. Such forfeiture clauses always provide that upon the breach of the condition the lessor or the grantor may re-enter upon the premises, and have the

same in his former estate; but it would be novel law to hold that under such a clause the lessor or grantor might lawfully by force and arms repossess himself of the estate, after a breach of the condition, if such repossession were resisted by the lessee or grantee. In Railroad Co. *v.* Johnson, 119 U. S. 608, 7 Sup. Ct. 339, the supreme court laid down the rule which has been the common law ever since the statute of 5 Rich. II. c. 7, and was probably then only declaratory of the law that a lessor entitled to possession may acquire such possession by lawful entry, but that entry by force is not lawful. Referring to forcible entry and detainer statutes, the court, speaking by MR. JUSTICE MILLER, said:

"The general purpose of these statutes is that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title, or may have the better right to the present possession, but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself, in a case of that kind, by his own hand, and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and then, when the parties are *in statu quo*, or in the same position as they were before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance."

The case just cited arose under the statutes of Arkansas, but the general principle was applied without respect to the statute in the case of Railway Co. *v.* Harris, 7 Sup. Ct. 1286. The language just quoted was quoted with approval in that case, which arose out of an attempt by one railroad company to seize a railroad in possession of another railroad company on the ground that the first railroad company had the right of possession. The leading case upon this sub-

ject is that of Newton *v.* Harland, 1 Man. & G. 644, and a number of American cases upholding the same principle will be found cited in Ames, Cas. Torts, 143, note. In such cases as the present, where resistance would create a riot, and lead to the irreparable injuries so frequently resulting therefrom, equity will enjoin the threatened use of force without respect to the question who has the right of possession. In Cooke *v.* Boynton, 135 Pa. St. 102, 19 Atl. 944, the plaintiff was the lessee of certain coal mines. The lessor claimed that he had forfeited his rights as such, and that the lessor was entitled to enter. The lessor tore up by force a tramway laid under the lease, and an injunction was then issued and sustained in enjoining the lessor from a continuance of such interference with the possession of the lessee, and this without regard to the merits of the controversy. The same rule was laid down in Easton, S. E. & W. E. P. Ry. Co. *v.* City of Easton, 133 Pa. St. 505, 43 Am. & Eng. R. Cas. 253, 19 Atl. 486, where a municipal corporation attempted to oust a street-railway company from the use of its streets on the ground that it was not complying with the terms of its grant. The same doctrine is laid down in Delaware County & P. Electric Ry. Co. *v.* City of Philadelphia, 164 Pa. St. 457, 30 Atl. 396, and in Asheville St. Ry. Co. *v.* City of Asheville, 109 N. C. 688, 14 S. E. 316, which were also cases of the interference by a municipal corporation with the occupation of streets by street-railway companies. See, also, Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. 358, 367. It is difficult to reconcile these cases with that of Pacific R. Co. *v.* Leavenworth, 1 Dill. 393, Fed. Cas. No. 10,649, which can hardly be supported.

It is argued with much vigor and force that to hold that the resolution of the city declaring a forfeiture and its intention to resume possession of the premises is nothing but the declaration of the existence of a breach of the contract between two private persons by one of them, and that to hold that it comes within the inhibition of the fourteenth amendment, will

be to hold that any tort or improper seizure by the officials of a municipal corporation is the act of the state, and a taking of property without due process of law, contrary to the federal constitution. It is true that a municipal corporation, when it exercises state authority as a state agency, may, by its torts and breaches of contract, come within the fourteenth amendment, or some other clause of the federal constitution, where a private individual would not. It does not follow, however, that all its torts and all its breaches of contracts are within those prohibitions, because in the case of some of its contracts it acts only as a private corporation. With respect to the occupancy of a street, however, which it controls by virtue of its being an agent of the state, and a trustee for the public, its action in depriving persons having vested property rights in the street will, if without due process of law, be state action, within the inhibition of the fourteenth amendment. For our present purpose, it is not important whether this threatened taking possession of a street under a resolution by force is to be regarded as legislative or executive action, for either, as we have seen, is within the inhibition of the clause of the first section of the fourteenth amendment, which forbids a state to deprive a person of his property without due process of law. What has been said necessarily leads to the conclusion that the court below was right in sustaining its jurisdiction on the ground that the action of the city taken and contemplated would constitute a violation of the fourteenth amendment, and might be prevented by injunction. In so far as the appeal of the city is concerned, therefore, the decree of the court below must be affirmed.

We come now, however, to a much more difficult question, which arises on the appeal of the complainant below, the railroad company. The court below held that there was no jurisdiction under the bill, except that which arose out of the threatened taking possession of the street, and ousting the railroad company therefrom by force, without due process of law. It enjoined the city only from taking forcible possession of the street. This injunction might properly have been

founded on the relative situations of the parties as they were admitted to be. The fact that the railroad company was in possession of the street, gained lawfully, and that the city could not rightly enforce a forfeiture without judicial proceedings, was a sufficient ground for granting the injunction which the court below granted; and it became immaterial, therefore, in furnishing this remedy, whether the railroad company had violated a condition forfeiting its estate. If the threatened use of the police to enforce the resolution of forfeiture was essential to the federal jurisdiction, then it would seem that the order of the court below disposed of the entire controversy before it. If, however, the resolution of the legislative council was a law of the state regulating interstate commerce, or was a law of the state impairing the obligation of contracts, or depriving a person of its property without due process of law, then the complainant could invoke the jurisdiction of the court below to enjoin its enforcement, without regard to the method by which it was proposed to carry it into effect.

This brings us to the next question in the case. Was the action of the city a law attempting to regulate interstate commerce? Plainly it was not. A railroad company has a right to make a contract with respect to interstate commerce, and to bind itself to certain rates, if it chooses to do so. It bound itself here to impose no rates which were unequally discriminating against the city of Memphis. This was its duty under the interstate commerce law, if it had any power to fix rates upon such commerce, and it might contract with any person or city to do that which it was its duty to do under the law. The action of the city, therefore, was merely an attempt to enforce a contract right, and not to regulate interstate commerce, except in so far as the common carrier had lawfully bound itself to the city contractually with respect to a particular part of that commerce.

Same—Same—Interstate Commerce.

We come, then, to the question: Did this resolution violate that part of section 10, art. 1, of the constitution of the

United States, declaring that "no state shall * * * pass any * * * law impairing the obligation of contracts"?

First. Was the resolution a law of the state within the meaning of this clause? It has frequently been decided that, where a municipal council passes an ordinance in pursuance of authority vested in it by the state legislature, which is legislative in its character, and which is merely the exercise of delegated power to make laws that the legislature might have made directly, such an ordinance is a law within the inhibition of the constitution if it impairs the obligation of a contract. Murray *v.* Charleston, 96 U. S. 432; U. S. *v.* New Orleans, 98 U. S. 381, 392; Meriwether *v.* Garrett, 102 U. S. 472; Waterworks Co. *v.* Rivers, 115 U. S. 674, 6 Sup. Ct. 273; City of Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77. If such ordinance is administrative, rather than legislative, then it is not within the constitutional inhibition, even though it impairs the obligation of a contract. New Orleans Waterworks Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18, 8 Sup. Ct. 741. The resolution in the case before us is admitted to have been passed with all the forms required, and by the vote necessary to enact an ordinance. It concerned the occupancy of the streets, which, as we have seen, the legislative council controls under delegated authority from the state legislature, as an agency of the state and a trustee for the public at large. It purported to find, and adjudged the ground to exist for declaring a forfeiture of a grant of an easement and a franchise in the streets which the legislative council as the agent of the state had made, and it exercised the option reserved to it in the grant of insisting upon such grounds as a forfeiture unless the grantee within 50 days should change its course of conduct. It is conceded that the grantee did not change its course of conduct, and that the resolution has become operative by its terms, if it can have any efficacy to effect a divestiture of title. Where the sovereign makes a grant upon condition subsequent, the breach of the condition does not of itself devest title and

Ordinances as Laws—Impairing Contract Obligations.

right of possession, but the power is in the sovereign, as grantor, to manifest his will that the condition shall be enforced, and this manifestation of his will is by legislative action. In this case the condition expressly requires that the council should exercise an option before forfeiture should ensue. In exercising such an option, the council is acting in a legislative capacity. Its declaration is a law. In Schulenberg *v.* Harriman, 21 Wall. 44, 63, in dealing with the question of enforcing forfeiture of grants of public lands granted upon condition, and the divestiture of title, MR. JUSTICE FIELD, speaking for the court, said:

"And it is settled law that no one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and, if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government. No individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed. In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground; or there must be some legislative assertion of ownership of the property for breach of the condition,—such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and therefore an office-found was necessary to determine the

estate; but, as said by this court in a late case, 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.' In the present case no action has been taken, either by legislation or judicial proceedings, to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the state as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alterate sections."

In U. S. *v.* Repentigny, 5 Wall. 211, 268, it was said, "The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government." See, also, Farnsworth *v.* Railroad Co., 92 U. S. 49, 66; Van Wyck *v.* Knevals, 106 U. S. 360, 368, 10 Am. & Eng. R. Cas. 664, 1 Sup. Ct. 336; Railroad Co. *v.* Mingus, 165 U. S. 413, 17 Sup. Ct. 348. An examination of these cases makes it entirely clear that a declaration of a forfeiture of a public grant for condition broken is legislative in its character. It is not conclusive, of course, of the facts asserted, and may be judicially resisted (see Railroad Co. *v.* Mingus, 165 U. S. 413, 434, 17 Sup. Ct. 348); but, if the condition in fact has been broken, it operates to devest the title and the right of possession. The resolution in question was a declaration enacted in form of law by the legislative council, a state agency, vested with legislative authority over the streets, by which, if valid, the title of the city and state and public in the streets granted to the complainant was devested from it, and revested in the grantors. Clearly, the resolution was and is a law of the state within the meaning of the constitution. It is contended that it cannot be a law, because it does not declare a present forfeiture, but only a future one, contingent on conduct of the grantee. We do not think this feature of the resolution deprives it of its legislative character. The operation of laws is frequently

postponed to a future day, and made to depend on a contingency. When, as is conceded in the present case, the time of suspension is passed, and the contingency has happened, they are as efficacious as if they had contained no conditions. This resolution found and adjudged a condition to be broken, and declared that the council exercised its option to declare a forfeiture and to resume possession if the breach continued 50 days. The conduct declared by the council to be a breach, it is conceded, has continued, and the declaration of forfeiture has become operative.

There are many cases in which the supreme court has declared a city ordinance to be a law within the contract clause of the constitution which have much less of legislative character than public forfeitures of rights in the streets by municipal legislatures. Such a case is that of City of Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77. The water company filed a bill to enjoin the city of Walla Walla and its officers from erecting waterworks in pursuance of an ordinance of the city to that effect. The water company had a contract with the city by which the city stipulated that during the term of the contract it should not erect, maintain, or become interested in any waterworks except the one provided for in the contract, which it was given power to condemn. Subsequently the city passed an ordinance for the erection of new waterworks, and the question was whether that was a law impairing the obligation of a contract such as to give a federal court jurisdiction to enjoin its enforcement. The court, speaking by MR. JUSTICE BROWN, states the objection to the jurisdiction as follows:

"The argument of the defendant in this connection is that the action of the city in contracting with the water company, and in passing the ordinance of 1893, providing for the erection of waterworks, was not in the exercise of its sovereignty; that in these particulars the city was not acting as the agent of the state, but was merely exercising a power as agent of

its citizens, and representing solely their proprietary interests; that the council in such cases, as trustee for the citizens, stands in the relation to them as directors to stockholders in a private corporation, acting solely as the agent of the citizen, and no wise as the agent of the state, and therefore that neither the state, nor the city as its agent, can be charged either with the making or the impairing of the original contract; that for these reasons the constitution of the United States has no application to the case, the federal court has no jurisdiction, and the bill, upon its admitted facts, presents only a violation by citizen of the state of its contract with another citizen, and the plaintiff is bound to resort to the state courts for its remedy. It may be conceded, as a general proposition, that there is a substantial distinction between the acts of a municipality as the agent of the state for the preservation of peace and the protection of persons and property and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business. Questions respecting this distinction have usually arisen in actions against the municipality for the negligence of its officers, in which its liability has been held to turn upon the question whether the duties of such officers were performed in the exercise of public functions or merely proprietary powers. It is now sought to carry this distinction a step further, and to hold that, if a contract be made by a city in its proprietary capacity, the question whether such contract has been substantially affected by the subsequent action of the city does not present one of impairment by act of the state or its authorized agent, but one of an ordinary breach of contract by a private party; and hence the case does not arise under the constitution and laws of the United States, and the court has no jurisdiction, unless there be the requisite diversity of citizenship. How far this distinction can be carried to defeat the jurisdiction of the court or the application of the contract clause may admit of considerable doubt if the contract

be authorized by the charter; but it is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Manufacturing Co., 115 U. S. 650, 660, 6 Sup. Ct. 252; Waterworks Co. *v.* Rivers, 115 U. S. 674, 6 Sup. Ct. 273; St. Tammany Waterworks Co. *v.* New Orleans Waterworks, 120 U. S. 65, 7 Sup. Ct. 405; Crescent City Gaslight Co. *v.* New Orleans Gaslight Co., 27 La. Ann. 138, 147. It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. As was said by the supreme court of Ohio in State *v.* Cincinnati Gaslight & Coke Co., 18 Ohio St. 262, 293: 'And assuming that such a power [granting franchises to establish gasworks] may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority.' This case is directly in line with those above cited. See, also, Wright *v.* Nagle, 101 U. S. 791; Hamilton Gaslight & Coke Co. *v.* Hamilton City, 146 U. S. 258, 266, 13 Sup. Ct. 90; Bacon *v.* Texas, 163 U. S. 207, 216, 16 Sup. Ct. 1023; New Orleans Waterworks Co. *v.* City of New Orleans, 164 U. S. 471, 17 Sup. Ct. 161. * * * We know of no case in which it has been held that an

ordinance alleged to impair a prior contract with a gas or water company did not create a case under the constitution and laws of the United States. Granting that in respect to the two classes of cases above mentioned responsibilities of a somewhat different character are imposed upon a municipality in the execution of its contracts, our attention has not been called to an authority where the application of the constitutional provision as to the impairment of contracts has been made to turn upon the question whether the contract was executed by the city in its sovereign or proprietary capacity, provided the right to make such contract was conferred by the charter. We do not say that this question might not become a serious one; that, with respect to a particular contract, the municipality might not stand in the character of a private corporation; but the cases wherein the charter of a gas or water company have been treated as falling within the constitutional provision are altogether too numerous to be not questioned, or even to justify citation."

Here the contract, the obligation of which was found to be impaired, concerned only the furnishing of water to the citizens of a municipal corporation,—a subject-matter certainly not regarded as more within the governmental functions of a city than the supervision and control of the streets, and the granting and resuming of public rights therein; and the law which was held to impair the obligation of the contract was merely another ordinance providing for the construction of other waterworks by the city. Such municipal action as the building of waterworks has usually been regarded as proprietary, rather than governmental, and yet the ordinance directing it was held to be a law in violation of the federal constitution.

Same—Same.

Second. Does the resolution impair the obligation of the contract contained in the grant? If what the complainant has done and is doing is a breach of the condition of the grant, then the resolution was certainly neither a breach nor an impairment of the contract. It was only legislative action equivalent to a re-entry upon

condition broken in its effect upon the title and right of possession, and was, therefore, in exact accord with the terms of the contract and grant. If, however, the condition has not been in fact and in law broken, then the resolution as law assumes to devest title and the right of possession, when not permitted by the terms of the contract, and purports to secure a right to the city and her officers of resuming possession which would be violative of its provisions. This is certainly an impairment of the obligation of a contract. It is true that the question whether the resolution impairs the obligation of a contract turns on mixed questions of law and fact,—First, whether the contract provides for the forfeiture upon a breach of the covenant that the complainant will not charge to Memphis and her citizens unequally discriminating rates; and, second, whether complainant, or any corporation for whom complainant is responsible, is charging such rates. That the application of the constitutional restriction depends partly on a question of fact is no reason for holding that the case is not one in which it may be relied on. The existence of the contract, the impairment of which is averred, may often be an issue of fact. The circumstances which render the operation of the law an impairment of the obligation of the contract may often be brought to the knowledge of the court by parol proof.

Nor does it avoid the application of the constitutional restriction to say that, if the condition was not broken, this resolution was a mere breach of the contract, and not an impairment of its obligation. To begin with, it may be doubted whether a mere declaration of forfeiture, when the condition is not broken, not followed by forcibly taking possession, is a breach of the contract and grant. It forms a cloud upon the grantee's title, but does it break any covenant in the grant? It is not necessary to discuss this question, because it is immaterial whether it is a breach of the contract or not. It impairs the obligation of a contract if it purports by force of law to authorize any one to do that which would be a breach of the con-

tract. This the resolution certainly does, assuming the condition not to have been broken, for by declaring the revestiture of title and right of possession in the city, it authorizes the city officers peaceably to take possession of the street, and to take up the tracks, and would doubtless authorize the bringing of suits by abutting owners for a nuisance peculiarly harmful to them. The language of CHIEF JUSTICE WAITE in Brown *v.* Colorado, 106 U. S. 95, 98, 1 Sup. Ct. 175, on a point not in judgment, might, upon first reading, justify the conclusion that the fact that a law is a breach of a contract previously made with the state prevents it from impairing the obligation of the contract, but such is not the proper construction of the words of the chief justice. The case was one coming to the supreme court from the highest court of the state under the twenty-fifth section of the judiciary act, to review a judgment in ejectment in favor of the state of Colorado against one who had granted the land to the state, and who defended on the ground that a condition of the grant was that the capitol was to be built thereon, and it had been broken by a statute placing the capitol elsewhere. The state court had found there was no such condition in the grant. The supreme court held that the validity or invalidity of the statute and its impairment of the contract were not in question, because the state did not admit the condition, and did not rely on the statute as a justification for a breach of it. The chief justice said, in effect, not generally that a breach of a contract by a state law would not impair its obligation, but only that in the case then before the court, where the statute was not relied on by the state as authority for its alleged breach of its contract, the statute did not impair the obligation of the contract in such way that the defendant could make, in that case, a federal question on its validity, upon which to reach the supreme court. Certainly, the chief justice meant to lay down no general rule that a law which violates a contract does not impair its obligation, for cases in the supreme court supporting a contrary view are too numerous. In the Walla Walla Case, cited above,

it is difficult to see in what respect the ordinance of the city directing the construction of waterworks impaired the obligation of the prior exclusive grant, except in that it was an express breach of the covenant of the city in the grant that the city would not construct waterworks of its own, but would buy those of the grantee. In the case at bar we have a law which, if that which is recited to be a fact by its terms is not a fact, purports to give state authority to commit acts which would be breaches of a contract. It purports to restore the street to the city, so that private citizens would be authorized thereby to treat the same as city property, and city officers would be authorized to take peaceable possession, peaceably to take up the tracks, and to remove other property of the grantee therefrom. It seems to us that this is a law impairing the obligation of a contract if founded on a nonexistent breach of a condition.

It is unnecessary for us to discuss at length the reasons for holding that the resolution was a law depriving the complainant of its property without due process of law, if, in fact, the condition had not been broken, for they are substantially the same as those just stated for concluding that the resolution is a law of the state impairing the obligation of the contract. If this resolution violates the federal constitution, there can be no doubt that complainant is entitled to equitable relief. It is certainly a cloud upon the title of the railroad company in its occupancy of the street, which it may ask a court of equity to remove, and to enjoin any claim under it. We conclude, therefore, that the bill stated a good cause of action on the ground that the resolution of the city of March 25, 1898, impaired the obligation of the contract under which the railroad company occupied Kentucky avenue, if it be true, as averred in the bill, that no condition of the contract had been broken justifying forfeiture. This gave to the court below jurisdiction of the whole controversy between the city and the railroad company; and, inasmuch as the suit had been brought a considerable time before the state suits were

Impairment of Federal Jurisdiction—Injunction.

brought, it justified and required the court below to enjoin the suits in the state court as an impairment of its jurisdiction over the controversy with which it had been invested by the filing of the bill. That such a remedy is not in conflict with section 720 of the Revised Statutes, forbidding the federal courts to issue injunctions against proceedings in a state court, is abundantly established by authority. French *v.* Hay, 22 Wall. 250–253; Dietzsch *v.* Huidekoper, 103 U. S. 494–498; Fisk *v.* Railroad Co., 10 Blatchf. 518, 9 Fed. Cas. 167; Union Mutual Life Ins. Co. *v.* University of Chicago, 6 Fed. 443; Sharon *v.* Terry, 36 Fed. 337; Garner *v.* Bank, 16 C. C. A. 86, 67 Fed. 833. In this view of the case, the court below should have permitted the filing of the supplementary bill, and should have granted the injunction to restrain the suits in the state court. We are of opinion that the fifteenth section of the contract was one of the conditions referred to in section 16, and, therefore, that the only issue made is whether section 15 has been violated or not. Upon this issue the court below should allow evidence to be taken, and should declare the rights of the parties accordingly.

The decree of the court in so far as it refused the further relief prayed for by the complainant in its bill is reversed, with directions to take further proceedings not inconsistent with this opinion.

CITY OF DENVER

v.

MOEWES.

(*Court of Appeals of Colorado, April 9, 1900.*)

Streets—Repairs—Care Required of City—Instructions—Harmless Error.*—It was error to instruct that it was the duty of the defendant city to keep a street "in good order and condition;" as it was

*See *note*, 1 Mun. Corp. Cas. 58; Jackson *v.* City of Lansing (Mich.), 2 Mun. Corp. Cas. 724 and *foot-note*.

only bound to keep it in a reasonably safe condition for travel in ordinary modes, with ordinary care; but such error was cured by the concluding part of the instruction, and by another instruction.

Same—Same—Same—Same—Same.—It was error to instruct that it was the duty of the defendant city to "promptly" repair defects in its streets; as a municipal corporation is only bound to use reasonable diligence to repair the defect after the unsafe condition of a street is known or should be known by the municipal authorities; but where it appears that the defect in question had existed for an unreasonable length of time, and that the city had actual or constructive knowledge of it, such an error in an instruction may be harmless; and such an error is harmless where no question was raised as to the diligence, or want of diligence, of the city in repairing the defect, but liability was sought to be avoided on the ground that the defect was of such a character that it could have been easily guarded against by the exercise of ordinary care.

Harmless Error.—Harmless error is not reversible error.

Misleading Instructions—Appeal—Review.—Where the only vice in an instruction was that it had a tendency to mislead, and no additional explanatory instructions were requested, such error is not available on appeal.

Instructions—Appeal—Review.—Before a party can have alleged errors in an instruction reviewed on appeal, it must appear that objection to it was made in apt time in the trial court.

Same—Same—Same.—Where a party makes only a specific objection to an instruction which is correct in part, he waives the right to have the instruction reviewed as a whole.

APPEAL by defendant from Arapahoe county district court. *Affirmed.*

George C. Norris and *Emerson J. Short*, for appellant.

Oscar Reuter, for appellee.

WILSON, J. This was an action brought to recover damages for personal injuries alleged to have been suffered by plaintiff through the negligent failure of the defendant city to keep one of its streets in repair. The defect or obstruction in the street complained of was a trench or gully across Fourteenth avenue, near its intersection with Jefferson street, from 18 to 24 inches deep, and from 12 to 18 inches wide at the top, which was supposed to have been caused by the overflow or leakage from a large

Case Stated.

irrigation ditch near by. The plaintiff charged that, while driving a coal transfer wagon along this street, he, himself being in the exercise of due care and caution, attempted to cross this trench, when, by the sudden dropping of the wheels of the wagon into the trench, he was thrown from his seat, and against a stationary electric light pole at the side of the street, with great violence, thereby causing serious bodily injuries. It was further charged that there was nothing to indicate any danger, and that in fact, the gully being full of water, there was nothing to indicate the existence, even, of any trench or unusual depression. Trial was to a jury, and, verdict and judgment being in favor of the plaintiff, the defendant appeals.

The following among other instructions to the jury was given at the request of plaintiff: "You are instructed that it was the duty of the city of Denver, the defendant herein, to keep its streets at the intersection of Fourteenth avenue and Jefferson street in good order and condition on and before June 8, 1894, and that the plaintiff, on said last-mentioned date, and at the time he was thrown from his wagon, was lawfully on said streets and intersection, and had the right to expect that said intersection was in good order and condition; so that if you believe from the evidence that there was a gully across the whole or a part of said intersection, on or about June 8, 1894, and that the said city of Denver had knowledge of its existence, or that such gully had been there for a sufficiently long time so that the city or its proper officers might reasonably have known of its existence, and the city did not promptly repair the same, and that such gully was dangerous to persons passing along the street and crossing the same with vehicles such as the plaintiff's wagon, and that on or about June 8, 1894, the plaintiff passed along said street, and over said gully, with his wagon, and was unable, with due and ordinary care and diligence, to discover or observe the dangerous condition of said gully, and in crossing said gully used proper care to cross such a gully as it must have appeared to a person of ordinary care and dili-

gence, and that in so passing over said gully he was thrown from his wagon by reason of the dangerous condition of said gully, and was thereby hurt, bruised, or injured, you must find for the plaintiff."

It is urged by defendant that there were two errors in this instruction. In the first place, it is claimed that the court erred in declaring, as it did, that it was the duty of the defendant to keep the street in question "in good order and condition," on and before the time of accident. We think that in this respect the contention of defendant is correct. The duty imposed upon a municipal corporation in respect to its streets is to keep them in reasonably safe condition for travel in ordinary modes, with ordinary care, and it is by no means an insurer against all accidents which may occur. City of Denver *v.* Dunsmore, 7 Colo. 329, 3 Pac. 705; City of Boulder *v.* Niles, 9 Colo. 418, 12 Pac. 632; City of Denver *v.* Aaron, 6 Colo. App. 234, 40 Pac. 587; Turner *v.* City of Newburgh (N. Y. App.) 16 N. E. 344; Dill. Mun. Corp. § 1006.

Streets—Repairs—Care Required of City—Instructions—Harmless Error.

The words "good order and condition" are not synonymuos with those which we have just stated as defining the duty of a city. They have a much wider signification, and, when not qualified, a jury might infer and understand that it was the duty of the city at all times to keep its streets in absolutely safe condition. A street might not be considered in "good order and condition," according to the usual and proper import of those terms, but still it might be in a reasonably safe condition for travel in ordinary modes, with the exercise of reasonable and ordinary care. The word "reasonably" may involve the consideration of many attendant circumstances, such as the nature of the country where the street is located, the character of the highway, the care usually exercised in reference to such highways, its location in the city, as, for instance, whether it be in a populous or sparsely settled part, in a business or residence portion, whether it be frequently used, and what was the character

of the use to which it was generally subjected. Dill. Mun. Corp. § 1006.

In the argument much stress has been laid upon the other error assigned to the same instruction. It is complained that the jury were, in effect, told that the city was charged with the duty to promptly repair an alleged defect in a street, after the city had knowledge of its existence, or the circumstances were such that knowledge might be inferred. This, standing unsupported and alone, without reference to the special facts of the particular case as shown by the evidence, might in some cases tend to mislead the jury. In City of Boulder *v.* Niles, *supra*, it was expressly declared that a municipal corporation "is responsible only for reasonable diligence to repair the defect or prevent accidents after the unsafe condition of the street is known, or ought to have been known, to it, or to its officers having authority to act respecting it." "Promptly" is defined by the best lexicographers to mean "quickly," "expeditiously," and is so understood in common usage. The city might fail to repair a defect promptly, and at the same time might use such reasonable diligence in discharging the duty as would relieve it from liability for accident. In determining whether or not reasonable diligence was exercised in actions of this character, the jury are entitled to consider such attendant circumstances that might bear upon the question, and to which we have referred in our discussion of the duty with which the city is charged to keep the streets in repair. The celerity with which a city might be required to repair a defect, in order to relieve itself of liability for injuries therefrom, might be qualified by various circumstances, such as the length of time the defect had existed, its cause, the location of the street, the amount and volume of travel over it, etc. As we have intimated, however, such an expression in an instruction might not always be fatal. If the evidence showed that the defect had existed for an unreasonable length of time, and that the city had actual or constructive knowl-

Same—Same—Same—Same—Same.

edge of it, the defect in the instruction might be wholly without prejudice.

With reference to the first error complained of, it is sufficient to say that whatever might have been its effect it was wholly cured by the concluding part of the same instruction, and by another instruction given by the court at the request of the defendant city. In the latter, the jury was expressly told that the city was not liable if the street complained of was at the time of the accident in a reasonably safe condition for travel in ordinary modes, with ordinary care.

With regard to the second error alluded to, it would seem that it could not have misled the jury, nor have actually prejudiced the defendant, because the entire case appears to have been tried upon the theory by the city that the street was in a reasonably safe condition for travel, in the ordinary mode, by one in the exercise of ordinary care; in other words, no question seems to have been raised as to the diligence, or want of diligence, of the city in repairing the defect, but liability was sought to be avoided on the ground that the defect was of such a character that it could have been easily guarded against by one in the exercise of ordinary care, and that the plaintiff must, of necessity, have been guilty of contributory negligence which would bar his recovery. It is true that the duty was incumbent upon plaintiff to make proof to the effect that the city had knowledge, either actual or constructive, of the existence of the defect, and had not exercised proper diligence, or the required diligence, in its repair. There was some evidence to this effect,—both that the city had actual notice, and also that such a great length of time had elapsed that it had constructive notice. It is true this evidence was neither voluminous nor very conclusive, but there was enough to go to the jury, and it was not disputed. However this may be, there are other and more conclusive reasons why this error in the instruction, however objectionable it might be, would not demand nor sustain a reversal of the judgment. As we have said, there is no indication appearing, from an examination of the entire record, that the jury was actually

Harmless Error.

misled by this error. Under all of the circumstances of the case, considering the theory upon which it was tried by apparent consent of both parties and the evidence presented, we feel quite clear that the jury was not misled. The vice in the instruction was that it had a tendency to mislead. In such case, it was the duty of the defendant to have asked additional explanatory instructions before it could avail itself of this defect in an appellate court. 2 Thomp. Trials, § 2346; Tramway Co. *v.* Lassasso, 22 Colo. 449, 45 Pac. 409. This the defendant did not do.

Misleading Instructions—Appeal—Review.

Again, the only objection which the defendant made to the instruction on the trial of the cause was a special and specific one. It was in these words: "The defendant excepts to instruction No. 2, given by the court, for the reason that it states, in legal effect, that any defect in a street which may have caused the injury is actionable negligence; and for the further reason that there is an irreconcilable conflict between this instruction No. 2, given by the court on request of plaintiff, and instruction No. 10, given by the court upon request of defendant." Neither of these objections was tenable. The error now complained of was not called to the attention of the trial court, and is urged for the first time in this court. It has been repeatedly held by this court, and by the supreme court, that, before a party can have alleged errors in an instruction reviewed in an appellate court, it must appear that objection to it was made in apt time in the trial court. The reason of the rule is a sound one, and is necessary for the prompt administration of justice. *Nisi prius* judges, in the haste which is required of them in the preparation and examination of instructions, frequently very voluminous, may inadvertently overlook an error which they would promptly rectify if it was called to their attention. The object of this rule, therefore, is to require parties who complain of errors in instructions to make an objection to them, so that the attention of the judge may be called to it,

Instructions—Appeal—Review.

and he given an opportunity to correct it. Railroad Co. v. Ryan, 17 Colo. 104, 28 Pac. 79; Wray v. Carpenter, 16 Colo. 274, 27 Pac. 248.

It may be said that a mere general objection, without specifying any reasons, would be sufficient to subject the instruction to review by the appellate court. This may be true, but we think the reason of the rule, at least, would be violated if, as in this instance, a party waived his right to make a general objection, and made a specific one, and thereafter could be allowed to raise in the appellate court other objections, which were not covered by, and included in, his specific exception. When a party makes a specific objection, he calls the attention of the court only to those matters which are embraced in it. We think these views are expressly sustained by our supreme court in a recent case. Car-Coupler Co. v. League, 25 Colo. 135, 54 Pac. 642. Any other rule of procedure would be manifestly unfair to trial courts, and would materially tend to retard the proper dispatch of business and the due administration of justice. The public, as well as litigants, are interested in having law suits finally brought to a conclusion. This would be, however, a somewhat remote contingency if a party could sit by, and, without objection, see a court commit a technical error, and then, if he failed on the trial, urge this error in the appellate court to secure a reversal of the judgment and a new trial. The same might occur at the next trial, and thus the process go on indefinitely, proving an endless chain. It is not unreasonable to hold that, where a party makes only a specific objection to an instruction, he waives the right upon appeal to insist upon any other objections. It would otherwise be placing a premium on efforts to mislead. By directing the attention of the judge to certain specific objections, his attention would naturally be diverted from other portions of the instruction, and he would have a right to conclude that, as to these, there were no objections.

Same—Same—Same.

Possibly, if the entire instruction had been erroneous, the

direction of the attention of the court to any particular portion of it might not have waived the right to have the whole reviewed, but this was not the case here. The alleged error under consideration did not permeate the entire instruction. Under the circumstances to which we have referred, and for the reasons given, we are of opinion that the defendant waived its right to complain of it in this court.

There were some further assignments of error, but they are not, in our opinion, of sufficient gravity to require a discussion. In the briefs of council, and in the oral argument, the errors relied upon are those to which we have given attention. We find nothing in the record which would justify a reversal of the judgment, and we feel less reluctance in so holding when it appears that this cause has been three times tried, and in each judgment was for the plaintiff. The former opinion will be withdrawn, and the judgment will be affirmed. Affirmed.

COREY

v.

CITY OF ANN ARBOR.

(*Supreme Court of Michigan, May 15, 1900.*)

Ice on Sidewalk—Personal Injuries—Notice of Defect—Liability of City.*—Where a person is injured on a sidewalk, by reason of ice formed only three days before the accident, from water which had been carelessly allowed to flow from a hydrant on private premises, and neither the *locus in quo*, nor any other circuumstance tends to show constructive notice of the defect on the part of the city, in the absence of proof of its actual knowledge of the defect, there can be no recovery in an action against the city.

ERROR by defendant to Washtenaw county circuit court. *Reversed.*

Plaintiff slipped upon an icy sidewalk on Williams street, in the city of Ann Arbor, in the evening of February 4, 1898,

*See *notes*, 1 Mun. Corp. Cas. 58 *et seq.*

and received serious injuries. The ice was opposite the premises of one Rockwell, who had a hydrant in his yard. It is claimed that the penstock either leaked or was left partly open, so that the water ran from it across the lawn to the sidewalk; that it extended quite a distance down the walk, and froze. The ice was smooth, and formed no ridge. There were several inches of snow upon the ground, and the weather for several days previous had been very cold. The sidewalks were covered with snow, which was packed very hard, all over the city, and were more or less slippery. Plaintiff gave testimony tending to show that this water flowed from the hydrant on Tuesday preceding the accident, which was on Friday following. Defendant gave evidence tending to show that the water flowed from the hydrant on the night preceding the accident. Plaintiff was a dressmaker, and lived, with her parents, upon the lot adjoining Mr. Rockwell's. She testified that she went out on Thursday evening, but had not been out of the house since Monday previous until the night she was injured. She is unable to locate the spot where she was injured, and there is some doubt, even from her own statement, whether she fell upon the ice formed by the water from the hydrant. The defendant requested the court to direct a verdict for it upon the ground that no liability was shown. The learned circuit judge stated that, if the case was "to end in his court, he might take a different course about it, but that there was a sort of lingering doubt in his mind that the supreme court might hold there was a liability, and he would, therefore, give the plaintiff the benefit of the doubt." Plaintiff recovered verdict and judgment.

O. E. Butterfield (*John F. Lawrence*, of counsel), for appellant.

Lehman Bros. & Stivers, for appellee.

GRANT, J. (after stating the facts). It is conceded that the sidewalk itself was properly constructed, and was in a

safe condition for public travel. It was only made unsafe by the ice caused by the water flowing from a private hydrant. Counsel for defendant contend that the statute does not cover this case. Counsel for the plaintiff contend that, since the icy condition was not caused by the elements, the city is liable for the condition. It is unnecessary to determine this question, since there is another fatal objection to the plaintiff's right to recover. It is conceded that the defendant city had no actual notice. Under plaintiff's own evidence, the ice had been there but three days before the accident. It is not shown that any officer of the city, charged with the duty to see that the sidewalks were kept in safe condition for public travel, had been along these streets during that time, or that its condition was a matter of public talk. Nothing had occurred to call the attention of an officer there any more than to any other part of the city. The city officials had the right to assume that no citizen would be guilty of so careless an act as to leave his hydrant open, and let the water flow over the sidewalk. Neither the plaintiff herself, nor any member of her household, though they lived within a few feet, appear to have known anything about its condition. If neither she nor they knew anything about it, why should the officers of the city be presumed to have known it from the fact of its existence for three days? There had been a snow the night before, and covered it up. The city might lawfully assume that this sidewalk would remain in good condition, and that no private citizen would do any act to render it unsafe. The city was under no legal obligation to employ men to patrol the streets to see that such things were not done, or to remedy them when done. The record utterly fails to show a condition of affairs so notorious that a jury might infer notice to the corporation. There are many miles of sidewalk in the city of Ann Arbor. In support of their contention that the city should have known it, counsel for plaintiff say: "The place of the accident was but a few blocks from the business portion of the city." What do they mean by "a few blocks,"—three, four, or five? For all that

appears upon this record, it might have been a half mile from the principal business streets of the city. But this cannot make any difference. It was off the business streets, and there was no occasion for any officer of the city to go there until in some manner notified of the condition. Moon *v.* City of Ionia, 81 Mich. 635, 642, 46 N. W. 25, is directly in point, and controls this case. The defendant in that case claimed that the walk was repaired August 15th. Plaintiff was injured on the 18th. It was held that, if this were so, actual notice of the defect was necessary. See, also, Smith *v.* City of Brooklyn, 36 Hun 224. Judgment reversed, and a new trial ordered. The other justices concurred.

COMMISSIONERS OF ROADS AND REVENUES OF POLK COUNTY

v.

MAYOR, ETC., OF CEDARTOWN.

(*Supreme Court of Georgia, May 14, 1900.*)

Extension of City Limits—Duty to Repair Bridges.*—When the corporate limits of a city are so extended as to embrace therein a portion of a public highway, and a bridge over a stream crossing the same, the municipal authorities at once acquire the right to exercise jurisdiction over the bridge, and are chargeable with the duty of keeping it in repair after the county authorities have expressly relinquished such jurisdiction, which they may do with or without the assent of the municipal authorities.

(Syllabus by the Court.)

ERROR by defendants from Polk county superior court. *Reversed.*

Blance, Irwin & Wright, for plaintiffs in error.

John K. Davis and *Sanders & Davis*, for defendants in error.

*See *notes*, 2 Mun. Corp. Cas. 757.

Comm'rs of Polk County *v.* Mayor, etc., of Cedartown

COBB, J. The mayor and council of the city of Cedartown filed their petition, praying that the writ of *mandamus* might issue to require the county commissioners of Polk county to repair, and, if necessary, rebuild, a bridge which had been constructed under the direction of the county authorities. The petition set forth, in substance, the following: In 1889 the county commissioners ordered that a named person should proceed as early as practicable to purchase material to build a bridge across a named stream. In pursuance of this order the bridge was built at the county's expense, and was kept in repair by the county authorities for a number of years. At this time the road of which the bridge formed a part was not within the corporate limits of the city of Cedartown. After the building of the bridge, the limits of the city were extended so as to embrace within the same the bridge in question. On September 19, 1898, the county commissioners passed the following order: "Ordered, that the authorities of Polk county relinquish all jurisdiction or control of all the bridges or causeways inside the incorporate limits of Cedartown and Rockmart, and will not be responsible for any damages to the public caused by any bridges or causeways inside of said incorporate limits." In 1899, the bridge being out of repair, the city authorities requested the county authorities to repair the same, and notified them that the city did not claim the right to exercise any jurisdiction over the bridge. The county authorities declined to repair the bridge, giving as a reason that the same was within the corporate limits of the city of Cedartown. The answer of the respondents was substantially as follows: They admitted that the bridge had been built by the county authorities, but alleged that, since the same had been taken within the limits of the city, the county authorities had neither made, nor authorized to be made, any repairs on the bridge; recognizing that, after the limits of the city had been extended so as to embrace the bridge, the same passed under the jurisdiction and control of the city. The order referred to in the petition was passed at a regular meeting of the county commissioners. The case

came on to be heard, and a judgment was rendered making the *mandamus* absolute, and requiring the respondents to keep the bridge in repair, and, when necessary, to rebuild the same; the judgment reciting that there was no issue of fact involved in the case. To this judgment the respondents excepted.

The moment that the charter of the city of Cedartown was so amended as to embrace within the limits of that corporation that portion of the public road of which the bridge in question formed a part, the jurisdiction of the county over this part of the highway ceased, and the same became subject to the control and jurisdiction of the municipal authorities. See Almand *v.* Railway Co. (Ga.) 34 S. E. 10, and authorities there cited. Consequently the duty of the municipal authorities to keep in repair the bridge in question arose as soon as it became a part of one of the streets of the city, and the county was no longer under any duty in respect thereof. Such being the case, no order or proceeding of any character was necessary in order to relieve the county authorities of the obligation to keep the bridge in repair. Especially would the county authorities no longer be under any obligation to keep the bridge in repair when it affirmatively appears that, since the same has become a part of one of the streets of the city, they have never undertaken to repair the bridge, but, on the other hand, by order duly passed, have expressly relinquished all jurisdiction and control over it. Even if the law in regard to the abolition of a public road is applicable to bridges, it is not necessary that such law should be followed in a case like the present, where the former county bridge becomes by legislative enactment a part of one of the streets of the city embraced within the county, and the county authorities from the date of the act acquiesced in such change by declining to make repairs upon the same as a county bridge. We do not mean to hold that the county authorities may not, if they see proper to do so, build bridges within the corporate limits of cities and towns, or improve the streets of towns and cities embraced within the limits of the

county. What is now held is that, where a road or bridge which is a part of a county road has by an amendment to a city charter been brought within the corporate limits of the city, the obligation on the part of the county to keep such road or bridge in repair immediately ceases. This case differs from Daniels *v.* City of Athens, 54 Ga. 79; *Id.*, 55 Ga. 609. In that case the county authorities, with the consent of the municipal authorities, built a bridge within the city limits, which was treated both by the county and the municipal authorities as a county bridge. It was held that under such circumstances the city was under no duty to keep the same in repair, notwithstanding the fact that it had at one time contributed a portion of the money necessary to rebuild the bridge. It was not held in the Daniels Case that the county was under any obligation to build the bridge, but simply that, having voluntarily built the bridge with the consent of the municipal authorities, it was under a duty to keep the same in repair, and that this duty did not rest upon the municipal authorities. There was nothing in that case indicating that the county had relinquished control over the bridge thus built by it. On the contrary, it distinctly appeared that it had exercised jurisdiction and control over the bridge, and that the repairs made by the city on the bridge were permissive and entirely gratuitous on its part. The ruling made in the Daniels Case would certainly authorize the county authorities to have retained control over the bridge involved in the present case, if they had seen proper to do so, but nothing therein ruled required that they should.

The judge erred in making the *mandamus* absolute. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

NEILL

v.

GATES.

(*Supreme Court of Missouri, Dec. 12, 1899.*)

Sewers — Breach of Construction Contract — Validity of Tax Bills.—By express provision of the ordinance under which the sewers were constructed, the work was to be completed within 90 days from the date of the contract for the work; and it was recited therein that the municipal authorities deemed the work necessary for sanitary and drainage purposes; and the contract provided that the work should be completed within such period, declaring that the time of beginning, rate of progress, and time of completion were essential conditions of the contract; and that for failure to comply with the time condition an amount equal to the sum of ten dollars per day for each and every day thereafter, until the completion of the work, should be deducted as liquidated damages from the amount of the final estimate. *Held*, that, as the work was not completed within such period, the tax bills issued therefor were void.

Same—Same—Annulment of Contract—Delegation of Municipal Powers.*—The power to annul such a contract for breach of its conditions is legislative in its character, and cannot be delegated by a city to the city engineer.

Ordinances—Impairing Vested Rights—Constitutional Law.—An ordinance purporting to impair rights existing under a contract with the city is void under sec. 15, art. 2, Const. Mo.

Void Contracts—Effect of Subsequent Ordinance.—An ordinance extending the time for the completion of such work, passed after the contract had been forfeited, could not have the effect of vitalizing it and creating a new liability on the part of the city upon tax bills issued upon the contract.

APPEAL by plaintiff from Jackson county circuit court. *Affirmed.*

This is an action by plaintiff, as assignee of one James Pryor, on six different tax bills, aggregating, not including

*See generally Knight *v.* City of Eureka (Cal.), 1 Mun. Corp. Cas. 247, and *note*, 252.

interest, when the suit was begun, the sum of $2,515.85, and issued by Kansas City against six different tracts of land owned by defendant in sewer district No. 167, in said city. On April 18, 1891, an ordinance was passed by Kansas City establishing sewer district No. 167, which embraced the land against which the tax bills involved in this litigation were issued. Thereafter, on June 10, 1891, an ordinance (No. 3247) was passed authorizing the construction of sewers in said district, by which it was provided that "the work should be completed within ninety days from the time a contract binds and takes effect;" the ordinance reciting that "this work the board of public works and common council deem necessary for sanitary and drainage purposes." The work was let by contract to said Pryor, and approved by ordinance of date July 23, 1891. By its terms, work was to be begun in 10 days, and to be completed in 90 days, from the time the contract was executed. The contract provided that the contractor should not be entitled to any portion of the contract price until the work was completed to the satisfaction of the city engineer, and then only in tax bills. The time in which the work was to be completed expired October 21, 1891. The work was begun and continued up to August 21, 1891, when Jennie C. Wiltsee and others brought suit against the contractor and Kansas City, and obtained a temporary injunction restraining them from a continuation of the work. The injunction was dissolved on October 31, 1891, but from the time it was granted until its dissolution no work was done on the sewer. The contract provides that: "(6) The work embraced in this contract shall be begun within ten (10) days after this contract binds and takes effect, and shall be prosecuted regularly and uninterruptedly thereafter (unless the engineer shall specially direct otherwise in writing), with such force as to secure its full completion within ninety (90) days from the date of its confirmation; the time of beginning, rate of progress, and time of completion being essential conditions of this contract. And, if the contractor

Case Stated.

shall fail to complete the work within the time above specified, an amount equal to the sum of ten dollars per day for each and every day thereafter, until such completion, shall be deducted as liquidated damages for such breach of this contract from the amount of the final estimate of said work. (7) If, in the opinion of the engineer, the first party, at any time during the progress of the work, is not prosecuting the work with a sufficient force to insure its completion within the time specified in this contract, he may notify the first party to employ such additional force as he deems sufficient; and, on the failure of said first party to comply with such notice within three (3) days after its delivery, the engineer may put on such additional force at the cost of the said first party, or he may, at his option, declare the contract annulled. And the power is reserved to the city engineer by Kansas City to suspend or annul this contract, or to suspend the doing of any work thereunder, at any time, for any failure on the part of the first party to fulfill the same, or for other good cause; and any action of the city engineer in suspending or annulling this contract, or suspending the doing of the work thereunder, and his decision as to the existence of cause or reason for such annulment or suspension, shall be conclusive as to the existence of such cause or reason in any controversy or litigation between the parties hereto or others claiming under them; and, if this contract be so suspended or annulled, the said first party shall not be entitled to anything on account of damages thereby, nor shall such annulment or suspension in any wise affect the right of said Kansas City to damages and penalties claimed by it on account of the failure of said first party." The evidence showed that work amounting to $4,000, at the contract price, was done up to February 11, 1892. On February 4, 1892, the city engineer, Butts, wrote Pryor, the contractor, and his sureties on his bond as contractor, to proceed with the work in three days, and on his failure to do so he would annul the contract; which he (the engineer) in so far as he had power to do so, did on February 11, 1892, because Pryor

would not proceed with the work, and so notified the board of public works. Butts, the engineer, went out of office in May, 1892, and was succeeded by John Donnelly. Pryor paid no attention to the cancellation of his contract by Butts, but continued to work on said sewer with the full knowledge and consent of Donnelly, the successor of Butts, until October 24, 1893, when the common council of Kansas City passed an ordinance (No. 5453) to construct a district sewer in sewer district No. 167, and by it repealed Ordinance No. 3247, entitled "An ordinance to establish and cause to be constructed district sewer in sewer district No. 167," approved June 10, 1891. This last-named ordinance makes no reference to the ordinance approving the contract between the city and the contractor, nor does it refer to the contract. On December 6, 1893, the common council of Kansas City passed "An ordinance to repeal an ordinance of Kansas City No. 5453 entitled 'An ordinance to construct a district sewer in sewer district No. 167, approved October 24, 1893.'" On March 19, 1894, said counsel passed an ordinance extending the time for the completion of said work under the original ordinance (No. 3247) to April 1, 1894. The tax bills were issued March 20, 1894. At the close of all the evidence the defendant interposed, and the court sustained a demurrer to the evidence, and in accordance therewith ruled that plaintiff was not entitled to recover, and rendered judgment for defendant. Plaintiff then filed motion for new trial, which was overruled, and he appeals.

Karnes, New & Krauthoff and *A. F. Smith*, for appellant.
Ess and *Georgen*, for respondent.

BURGESS, J. (after stating the facts). By express provision of the ordinance under which the work was done, it was to be completed within 90 days from the time a contract for the work bound and took effect, and, by the terms of the contract entered into between Pryor and the city for the work, it was provided that "the work embraced in this contract shall be begun within ten days after the contract binds and

takes effect, and shall be prosecuted regularly and uninterruptedly thereafter (unless the engineer shall specially direct otherwise in writing), with such force as to secure its full completion within ninety days from the date of its confirmation; the time of beginning, rate of progress, and time of completion being essential conditions of this contract. And, if the contractor shall fail to complete the work within the time above specified, an amount equal to the sum of ten dollars per day for each and every day thereafter, until such completion, shall be deducted as liquidated damages for such breach of this contract from the amount of the final estimate of said work." That the work was not completed within the time prescribed by the ordinance and contract under which it was done is not disputed, and, as time was the essence of the contract, and material, the tax bills issued for the work, and here sued on, must be held void (Rose *v.* Trestrail, 62 Mo. App. 352; McQuiddy *v.* Brannock, 70 Mo. App. 535; Trust Co. *v.* James, 77 Mo. App. 616), unless they are rendered valid by some act of the common council of Kansas City.

Sewers—Breach of Construction Contract—Validity of Tax Bills.

It is, however, claimed by defendant that the penalty prescribed by the contract for failure to complete the work within the time specified was an amount equal to the sum of $10 per day for each and every day thereafter, until such completion, to be deducted as liquidated damages for such breach of the contract from the amount of the final estimate of the work, and that this provision controls, and not that which prescribes the time, and makes it material, in which the work was to be done. But this provision in the contract is not in harmony with section 2 of Ordinance No. 3247, under which the contract was let, which requires the work to be completed in 90 days from the time the contract takes effect. The effect of this provision was to extend the time prescribed by ordinance for the completion of the work to any time that might suit the convenience of the contractor, the only penalty for which was $10 per day for every day over that in which the contract was to be completed, to be deducted from the amoun

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of the final estimate. In passing upon a similar provision in a contract for the same kind of work, in McQuiddy *v.* Brannock, *supra*, ELLISON, J., speaking for the court, said: "It is argued that the provision agreeing upon a forfeiture of $10 for each day of failure to complete the work within the time is an implied concession that the work might not be completed within the time, and yet the contract remain binding. In our opinion, this provision of the contract cannot be applied to any substantial departure from the contract as to time." The provision for the extension of time in the contract in this case is not only a substantial departure from the contract with respect thereto, but is not in harmony with the ordinance under which the contract was let, and must yield thereto.

It is further insisted that the common council, by Ordinance No. 2384, passed July 16, 1891, approved this contract in all its terms. Conceding this to be true, the tax bills were not thereby validated, because by the very terms of the contract it was provided that the work should be prosecuted regularly and uninterruptedly, with such force as to secure its full completion in 90 days, and the city engineer might, if the force of men in his opinion was insufficient, employ men at the contractor's expense, or he might annul the contract. Moreover, it was recited in the ordinance under which the contract was let, which was a part of the contract, that "this work the board of public works and common council deem necessary for sanitary and drainage purposes," and also provided "that the work should be completed within ninety days from the time a contract binds and takes effect"; thereby showing beyond any question that the time in which the contract was to be completed was of the essence of the contract and material thereto. The contractor ceased work on the contract, and the city engineer, on the 4th day of February, 1892, notified him that, unless work was resumed within three days from the receipt of the notice, with such a force of workmen as to warrant the completion of his contract within a reasonable time from that date, that his contract would be annulled, and on the 9th day of Febru-

ary, 1892, the engineer did attempt to annul his contract for the reasons stated in said notice, and so notified the board of public works on the 11th day of February, 1892. But defendant contends that the power to annul the contract was legislative in its character, devolved upon the city alone, and, even if possessed by it, could not be delegated to the city engineer, and that his act in attempting to terminate the contract, as well as the ordinance approving the contract in that regard, were void. There is a clear distinction between legislative and ministerial powers. The former cannot be delegated; the latter may. Thus, in Ruggles *v.* Collier, 43 Mo. 365, it is said: "There is a clear distinction to be observed between legislative and ministerial powers. The former cannot be delegated; the latter may. Legislative power implies judgment and discretion upon the part of those who execute it, and a special confidence and trust upon the part of those who confer it." So, in City of St. Louis *v.* Clemens, 43 Mo. 395, in speaking of the delegation of power to the engineer by the city council, the court observed: "The law requires them to act, not only in view of their direct responsibility to those who elected them, but also that they should exercise their united wisdom for the general good of the public. They cannot delegate a duty plainly and expressly devolved upon them to the mere discretion, and perhaps caprice, of a simple individual." See, also, City of St. Joseph *v.* Wilshire, 47 Mo. App. 130. While the city, by virtue of the legislative powers conferred upon it by the city charter, has the power and authority to establish sewers in the city, and to provide plans and means for their construction, the city could not delegate such powers; they being legislative, and implying judgment and discretion, to any person or persons, by contract or otherwise. Nor could the city have terminated the contract in question, in the absence of a provision in the contract authorizing it to do so. Besides, such power could no more be delegated to the city engineer than could the power to establish the sewer. It is true the city

Same—Same—Annulment of Contract—Delegation of Municipal Powers.

could have reserved to itself the right to have terminated the contract at any time, upon failure of the contractor to comply substantially with its terms, but she reserved no such right, but chose, in so far as she could do so, to confer the power upon the city engineer.

Defendant relies upon a number of adjudications as sustaining the power of the city engineer to terminate the contract, among which is Chapman *v.* City of Lowell, 4 Cush. 380. But in that case the city, by contract, retained control over the work which was to be done under and by the direction and supervision of a committee, both as to quality of the work and time of completion, and the contractor was notified to stop the work by the city, and not by the committee. Besides, there was no question as to the delegation of such power by the city in the committee to terminate the contract. Bierty *v.* City of New Orleans, 24 La. Ann. 21, is another case relied upon by defendant. But in that case the contract expressly provided that the city might cancel the contract, "in case the council is dissatisfied with the manner in which the work is being done." This, as we have said, might be done, but in the case at bar no such power was reserved to the city. Easton *v.* Canal Co., 13 Ohio 79, Williams *v.* Railway Co., 112 Mo. 463, 20 S. W. 631, and Chapman *v.* Railroad Co., 114 Mo. 542, 21 S. W. 858, are also relied upon by defendant; but the contracts in those cases were between individuals and private corporations possessing ordinary contractual powers, in which were involved no legislative powers or the delegation thereof; hence not in point. Our conclusion is that the act of the city engineer in annulling the contract was without authority and void.

We think it clear that it was beyond the power of Kansas City, by Ordinance No. 5453, approved October 24, 1893, to impair the rights of plaintiff which existed under the contract at the time of the passage of such ordinance, as such legislation with respect to such a contract was unconstitutional and void. Section 15, art. 2, Const. Mo. The ordinance extending the time for the completion of the work, made after the contract

Ordinances—Impairing Vested Rights—Constitutional Law.

had been forfeited, did not have the effect of vitalizing a contract which had theretofore been forfeited, and creating a new liability on the part of defendant upon tax bills issued upon such contract. Our conclusion is that the time within which the contract was to be completed was an essential element in the contract, and made so by the terms thereof for prudential reasons upon the part of the city, and that, as the contract was not completed within the time prescribed thereby, the tax bills issued for the work, and which form the basis of this action, are null and void. We therefore affirm the judgment.

Void Contracts—Effect of Subsequent Ordinance.

GANTT, P. J., concurs. SHERWOOD, J., absent.

ARNOLD

v.

TOWN OF WALTON.

(*Court of Appeals of Kentucky, March 29, 1900.*)

Municipal Corporations—Liability for Wrongful Removal of Officer.*—An action of tort will not lie against a town for the tortious acts of its trustees in removing the town marshal from office.

APPEAL by plaintiff from Boone county circuit court. *Affirmed.*

B. F. Menefee, for appellant.

J. G. Tomilin, for appellee.

WHITE, J. Appellant, Arnold, brought this action against appellee, town of Walton, alleging that he was duly elected marshal of Walton, and qualified and executed bond as such, and entered into the discharge of his duties, and, after serving some 2½ years, was, before his term expired, wrongfully, without right, and without notice, removed from

*See generally City of Omaha *v.* Croft, *ante*, 172, and *notes*, 182 *et seq.*

office by an ordinance or resolution of the board of trustees, and a vacancy declared, and another appointed to fill the place. Appellant concludes his petition, "Plaintiff says that by the wrongful act of defendant he has been damaged in the sum of one thousand dollars," and for that sum judgment is asked. The court sustained a demurrer to the petition, and, appellant declining to answer, his action was dismissed, and hence this appeal.

From a careful reading of the petition, it is clear that the action is not for salary or fees due, as there is no basis stated upon which to predicate such recovery; but it is clear that the cause of action upon which a recovery is sought is tort for the wrongful removal of appellant from the office of marshal. We are of opinion that an action of tort does not lie against the appellee town for the wrongful and tortious acts of the trustees in removing appellant from his office. We therefore conclude that the demurrer to the petition was properly sustained. Judgment affirmed.

GASTENAU

v.

COMMONWEALTH.

(*Court of Appeals of Kentucky, May 15, 1900.*)

Ordinance to Prevent Women from Frequenting Saloons—Validity—Constitutional Law.—A penal ordinance providing "that it shall be unlawful for any woman to go in and out of any building where a saloon is kept offering for sale any spirituous, vinous, or malt liquors, or to frequent, loaf or stand around said building within fifty feet thereof," is unconstitutional and void.

APPEAL by defendant from Bell county circuit court. *Reversed.*

G. W. Saulsberry, for appellant.

F. D. Goodwin and *T. G. Anderson*, for the Commonwealth.

Gastenau *v.* Commonwealth

GUFFY, J. The sole question presented for decision is whether or not the following ordinances are valid or constitutional. The appellant, having been convicted for a violation thereof, prosecuted an appeal to the circuit court, and, the circuit court having adjudged the ordinances valid, and rendered a judgment for cost against the appellant, he prosecutes an appeal from so much of the judgment as holds said ordinance to be valid. The ordinances read as follows: "Be it ordained by the board of council of the city of Middlesboro, Bell county, Ky.: (1) That it shall be unlawful for any woman to go in and out of any building where a saloon is kept offering for sale any spirituous, vinous and malt liquors, or to frequent, loaf or stand around said building within fifty feet thereof. (2) That it shall be unlawful for any saloon keeper or his clerk or employees to allow or permit any woman or women to come in or out of his building where spirituous, vinous and malt liquors are sold or offered for sale, and it shall be the duty of said saloon keeper, clerk or employees to immediately notify the officers that the first section of this ordinance had been violated, giving the name and color of the offender. (3) Any woman violating section No. 1 of this ordinance shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than $1.00 nor more than $10.00, or confined in the city jail not less than 10 days nor more than 30 days, or both, at the discretion of the court. (4) Any saloon keeper, clerk or employee of the saloon keeper violating section No. 2 of this ordinance shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than $5.00 nor more than $10.00 for the first offense, and for the second offense it shall be good grounds for the revocation of said saloon keeper's license." It is contended for appellee that the sole object of the ordinance is to regulate and control the sale of liquors by reason of the fact that very disreputable, low, and vile women congregate in and about saloons and places where liquor is sold, thereby causing affrays, fights, murder, and

other crimes. It is claimed that under subsection 27 of section 59 of the constitution the city council had authority to enact the ordinances in question. It is insisted for appellant that, in any event, the ordinance is too sweeping in its nature, and subjects every woman who may chance to be walking along the street and meet a friend, and stop within 50 feet of a saloon, or should go into a hotel where liquor is sold, to arrest and punishment. It seems to us that the ordinance in question is unreasonable, and an unnecessary interference with individual liberty, and tends to subject the vendor of liquors as well as citizens to unreasonable prosecutions. If the ordinance only included the persons mentioned in appellee's brief, we are not prepared to say that it would be invalid. But it might be that very good women would, for proper and legal purposes, find it necessary to go into a building where liquor was sold, or stop for a reasonable time within 50 feet of same; and, besides, we know of no rule of law which prohibits a well-behaved woman, for a lawful purpose, and in a lawful manner, from going into or near a saloon. It may be taken for granted that it is not often that such would be the case, but the ordinances in question make no exceptions. If the citizens of Middlesboro choose to have saloons established where liquor is sold, it follows that all orderly and well-behaved persons have a right in an orderly manner, and for a lawful purpose, to visit such saloons. For the reasons indicated, the judgment appealed from is reversed, and cause remanded, with directions to the court below to adjudge the ordinances in question invalid and unconstitutional, and for proceedings consistent herewith.

HENDERSON, MARSHAL,

v.

HEYWARD.

(*Supreme Court of Georgia, Dec. 1, 1899.*)

Intoxicating Liquors—Penal Ordinance—General Welfare Clause.—What is known as the "general welfare" clause in a municipal charter does not authorize the passage of an ordinance making it penal for one who has lawfully purchased without the limits of the municipality alcoholic liquors to receive the same therein without paying a specific tax, of a given amount, for the privilege of so doing.

Same—Same—Same.—The above is true notwithstanding the sale of such liquors is absolutely prohibited within the limits of such municipality.

(Syllabus by the Court.)

ERROR from city court of Cartersville. *Affirmed.*

John W. Akin, for plaintiff in error.

Jas. B. Conyers and *Ben J. Conyers*, for defendant in error.

Case Stated.

COBB, J. Heyward was arrested under a warrant charging him with the violation of an ordinance passed by the municipal authorities of the city of Cartersville, of which the following is a copy:

"Whereas, this being a prohibition city and county by a vote of the people, and after their best efforts to protect themselves from the curse of intoxicants, the shipment of vinous, malt and distilled liquors, continues to be made in our community to the injury and detriment of the morals, good order, prosperity and general welfare of this community and should be prevented or controlled: Therefore, the mayor and aldermen of the city of Cartersville in the exercise of the general welfare, police and other powers vested in them by the laws and the charter of the said city, and to accomplish

the purposes heretofore enumerated, do enact and ordain as follows:

"Section 1. That on and after the 4th day of March, 1899, it shall be unlawful for any person or persons, corporation or company to receive from any common carrier or person any package, jug, demijohn or bottle of vinous, malt or distilled liquors in said city until he, she or they have paid a specific tax of five dollars on each gallon or fraction thereof. Said specific tax must be paid to the treasurer of the city and a receipt of the treasurer must be presented to any common carrier or person before the delivery of such packages of intoxicants.

"Sec. 2. Be it further ordained by the authority aforesaid, that any person or persons, company or corporation who shall receive or have delivered to them any package or packages of distilled, vinous or malt liquors, without first procuring and exhibiting the receipt of the treasurer for the specific tax on such package or packages of intoxicants aforesaid, shall, on conviction thereof, pay for each violation of this ordinance a fine of fifty dollars or be worked thirty days in the chain gang of the city, either or both at the discretion of the court.

"Sec. 3. Be it further ordained that any express company, railroad company, or other carrier, public or private, or any agent or employee thereof, who shall deliver to any person in said city any of the packages hereinbefore enumerated without having produced to such carrier the receipt from the treasurer hereinbefore provided for, shall also be subject to the same penalties prescribed herein for violation of this ordinance.

"Sec. 4. Provided, that this ordinance shall not apply to the bringing and delivery, by one citizen of said city, to another citizen of said city, of not exceeding one quart of spirituous liquors for medical purposes, to be furnished only upon the prescription of a sober reputable physician that the same is necessary and to be used for medical purposes only."

Section 5 repeals conflicting laws.

While in custody, Heyward applied to the judge of the city court of Cartersville for a writ of *habeas corpus*, alleging in his petition that the ordinance which he was charged with having violated was invalid, for the reason that the municipal authorities had no power to pass the same, and that therefore he was held in illegal custody. Upon the return of the writ a hearing was had, and a judgment rendered discharging the petitioner from custody on the ground that the ordinance was void. To this judgment the marshal excepted.

Counsel for plaintiff in error did not expressly concede that the ordinance in question could not be upheld as an exercise either of the taxing or license power of the municipal authorities of Cartersville, but his entire argument was directed to the establishment of the proposition that the passage of the ordinance was a legitimate exercise of the police power. If we regard the amount required by the ordinance to be paid as a condition precedent to the reception and delivery of the liquors therein enumerated as a tax upon property, it must fail as such, for it is neither *ad valorem* nor uniform. Nor can it be regarded as a specific tax, or the imposition of a sum in the nature of a license fee, because, under its charter, the city of Cartersville has authority to impose such a tax or license fee only upon an occupation or business; and the buying of a single vessel containing whisky certainly cannot be properly regarded as an occupation or business. We pass, therefore, to a discussion of the question as to whether the ordinance can be upheld as a valid exercise of the police power of the municipality. It is conceded that the authorities had no express charter authority to pass the ordinance in question, but it is contended that it had the power under the general welfare clause of its charter, which is in the following language: "The mayor and aldermen shall have power to pass all ordinances that they may consider necessary to the peace, good order, health, prosperity, comfort and security of the city and the citizens thereof, not

inconsistent with the constitution and laws of this state and of the United States." Laws 1872, p. 181. The police power of a state may be exercised by the general assembly directly or indirectly, through the medium of the subordinate public corporations of the state. It may be that the state would have a right to prohibit the purchase of whisky. That the state has a right to prohibit absolutely the sale of whisky is no longer an open question either in this court or in the supreme court of the United States. Perdue *v.* Ellis, 18 Ga. 586; Hill *v.* Mayor, etc., 72 Ga. 314; Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. None of the decisions of this court, however, go to the extent of holding that a law prohibiting the sale of liquor in a designated territory has the effect of destroying entirely all property right in alcoholic liquors which may be brought into such territory. On the contrary, it has been expressly held that the fact that the sale of liquor was prohibited in a designated part of the territory of the state does not destroy the right of a person to own such an article within such territory. Fears *v.* State, 102 Ga. 274, 29 S. E. 463. It may be contended with great force that if the state, notwithstanding it recognized a property right in alcoholic liquors, can, under its police power, entirely destroy the right of the owner of such liquors to sell or dispose of the same within the limits of the state, which would in some instances be a practical confiscation of the property, it has the power to declare that no person shall by purchase come into possession of such property within the limits of the state. Laws prohibiting the sale of whisky are upheld as constitutional upon the ground that its sale is against the best interests of the public at large, and is a business which, if not inherently evil, is of such a nature that its presence is a constant menace to the peace and good order of society, as well as the welfare of individuals. If this be true, it would seem to follow that the state might enact any law which would effectually prohibit the traffic. A law prohibiting the sale would, if effectually enforced, prohibit the buying; and so, also, the prohibition of the purchase would

likewise prohibit the sale. The prohibition of the sale, therefore, puts a ban upon the entire traffic. Of course, a law making penal the sale would not, without more, make penal the buying; but the practical effect of such a law, if enforced, would be to prohibit the buying. It would seem to follow, therefore, that the state might go further than it has already gone, and make penal the buying. But, be this as it may, we are clear that a municipal corporation cannot, without express legislative authority so to do, pass any ordinance making penal the buying of alcoholic liquors from one lawfully authorized to sell the same.

It may be laid down as a general rule that, in addition to its express powers, a municipal corporation can only exercise those which are necessarily or fairly implied in, or incident to, its express powers, and those that are indispensable to the declared objects and purposes for which the corporation was created. 1 Dill. Mun. Corp. § 89. The power to pass a law making penal the purchase of intoxicating liquors is certainly not indispensable to the purpose for which the city of Cartersville was incorporated, and there is no express grant of authority to this effect; and hence the power is wanting, unless it can be implied from its general welfare clause, above quoted. A municipal corporation has no power to adopt ordinances for the prohibition or regulation of the sale of liquors, unless expressly authorized to do so, or unless such ordinances fairly and legitimately fall within the scope of the powers conferred upon them in general terms. Black, Intox. Liq. § 220. As an instance of the strictness with which the powers of municipal corporations over the subject of liquors have been construed, see Hill *v.* Commissioners, 22 Ga. 203. In that case, notwithstanding it appeared that the commissioners of the town of Decatur had authority "to restrict, prohibit, and regulate the sale, vending and distribution" of intoxicating liquors, "provided, no license to retail spirituous liquors shall exceed fifty dollars," it was held that the commissioners had no power to prohibit absolutely the sale of

liquor, and that they had authority only to grant a license upon the payment of a fee not exceeding $50. In Sanders *v.* Commissioners, 30 Ga. 679, it was held that the power "to regulate the rates of tavern licenses" does not confer the power to grant licenses; there being in existence a different system of issuing such licenses. It was further ruled that the power to grant tavern licenses was not embraced in a general clause of a town charter conferring upon it the power of general legislation for itself; JUDGE STEPHENS assigning as a reason for the latter ruling that "the courts will not infer that the legislature intends to authorize a local departure from a general policy of the state, unless the local exception is expressed in specific terms." In the case of Mayor, etc., *v.* Putnam, 103 Ga. 110, 29 S. E. 602, it was held that neither the general welfare clause usually found in municipal charters, nor the special power "to license and regulate the management of barrooms, saloons," etc., includes the power to establish and operate under municipal agency a dispensary for the sale of spirituous and malt liquors. This decision was made at a time when it could not be said to have been against the general legislative policy to operate dispensaries, for a number were being operated in the state under direct sanction of the general assembly. But the court construed the grant of power strictly, and said that a dispensary was neither a barroom nor a saloon, in legislative contemplation. If the general welfare clause of a municipal charter would not authorize the city authorities to establish and operate a dispensary, as a means of regulating and restricting the sale of liquors, it is difficult to see upon what principle such a clause would authorize the passage of an ordinance prohibiting the purchase of such license, or interfering with the right to receive the same after a purchase from one who was lawfully authorized to sell. The one would be no less a regulation than the other. It would seem, therefore, to follow from these decisions that a municipal corporation would not, without express legislative sanction, have authority to prohibit either the selling or buying of

intoxicating liquors within its limits. They may, of course, regulate, to a certain extent, the traffic in such liquors; but even then their powers, under the decisions above referred to, are not very broad, under the usual general welfare clauses found in municipal charters. If the rule is so strict as regards the sale of whisky, which the general assembly has seen fit to deal with as being within the police power of the state, and which, under the settled public policy of the state, has been either prohibited altogether, or allowed under the most rigid regulations, how much stricter ought it to be as regards a subject with which the general assembly has never seen fit to deal in any way whatever! Whenever the general assembly has, by direct enactment, or by its settled public policy, derivable from the various statutes passed from time to time, brought within the police power of the state any particular subject, then the municipal authorities of a town or city would seem to have the power, under the usual general welfare clause in municipal charters, to deal with such subject by proper ordinance, limited only by the established rule that they cannot deal with an act which is declared to be a violation of the criminal laws of the state. See, in this connection, 1 Dill. Mun. Corp. § 329. The sale of liquor is absolutely prohibited in some of the counties of this state. In other counties its sale is only permitted under licenses granted by the proper authorities. In still others, liquors are sold under governmental agency. In each of such localities the general assembly directly brings within the police power the subject of the sale of this article by expressly prohibiting it, on the one hand, or by regulating its sale, on the other. Having thus declared that the sale of liquors is a matter legitimately within the police power of the state, and having passed regulations in reference to the same, it necessarily follows that, when it grants to a municipal corporation the power usually conferred upon such corporations, they may deal with the sale of liquors within their limits as a subject which is within the police regulation of the state; and therefore ordinances passed for the purpose of furthering

this end are legitimately within the authority of a municipal corporation, under its general welfare clause. Such is what we understand to be the reason at the foundation of the decisions of this court in Paulk *v.* City of Sycamore, 104 Ga. 728, 31 S. E. 200; Brown *v.* Town of Social Circle, 105 Ga. 834, 32 S. E. 141; and Papworth *v.* City of Fitzgerald, 106 Ga. 378, 32 S. E. 363. These decisions were departures from the strict rule of construction employed in the earlier cases; and we think, under the principle announced in them, a municipal corporation may, under authority of its general welfare clauses, pass ordinances, within reasonable limits, dealing with the subject of the sale of intoxicating liquors. But the general assembly never has seen proper to deal in any way whatever with the subject of the purchase of intoxicating liquors, except as such subject may grow incidentally out of the subject of the sale. The general assembly has never passed any law making penal the purchase of liquors. The policy of a state is to be ascertained from its published statutes and laws. There never having been in force any law making penal the purchase of intoxicating liquors within this state, it may fairly be said that such a law would be a departure from its settled public policy; and any such departure must commence with the general assembly itself, either by a direct law to this effect, or by granting to some subordinate public corporation of the state express authority to make such a departure. The purchase of liquor from one who is himself violating the law in making the sale is, although not a crime under the law of this state, certainly such a transaction as is contrary to public policy. However, the purchase of liquor in this state from one who is lawfully authorized to make the sale is an act which, in its nature, is neither criminal nor contrary to public policy. It therefore follows that the reception by the purchaser of liquor so bought is not an act which can be legitimately dealt with by the authorities of a municipal corporation as an act within the police power of the state, in the absence of express power so to do.

It necessarily follows from the foregoing that, when the general assembly gave to the city of Cartersville the power embraced in its general welfare clause above quoted, it did not confer upon it authority to pass the ordinance now under consideration. It is true that the ordinance does not in express terms prohibit absolutely the buying of liquor; and, even if the condition annexed to the privilege of buying does not practically amount to prohibition, it certainly has the effect of deterring a person from exercising, and hampers a person in the exercise of, a right which is neither prohibited by express law, nor which can be said to be in any way contrary to the public policy of the state, as it is at this time established. The ordinance does not purport to deal exclusively with the subject of the reception of liquor from one who has no authority to sell the same. On the contrary, taking into consideration the entire ordinance, the conclusion is inevitable that the purpose of the ordinance is to deal with the subject of the reception of liquors by one who has lawfully purchased the same without the limits of the city. So construing it, it is void for want of authority in the municipal legislature to pass it. The judge of the city court did not err, therefore, in ordering that the petitioner be discharged from custody. Judgment affirmed. All the justices concurring.

Intoxicating Liquors—Penal Ordinance—General Welfare Clause.

Same—Same—Same.

PEOPLE

v.

BRAISTED.

(*Court of Appeals of Colorado, Oct. 9, 1899.*)

Intoxicating Liquors—Violation of Ordinance Instigated by Officer—Whether Penalty Recoverable.—A municipality cannot recover a penalty for a violation of an ordinance prohibiting the sale of intoxicating liquor by one not having a municipal permit, where the violation is instigated or procured by its officer.

People *v.* Braisted

Action for Penalty—Liability of City for Costs.—An action brought by a municipality to recover a penalty for the violation of an ordinance is a civil action, and the costs may be chargeable against the city.

APPEAL by defendant from Delta county court. *Affirmed.*

King & Robertson and *Fairlamb & Dickerson*, for the People.

R. M. Logan, for appellee.

THOMSON, J. This suit was instituted by the town of Delta, in the name of the people of the state of Colorado, to recover a penalty for the alleged violation by the defendant of an ordi-

Case Stated.

nance of the town prohibiting the sale by a druggist, not having a permit from the board of trustees, of spirituous or intoxicating liquors. The defendant was a druggist, and had no permit. It seems that a Mrs. Dixon gave the complaining witness, Mrs. Garland, an order for a pint of alcohol, and the money to pay for it. To whom the order was addressed, does not appear. Mrs. Garland took the order to Mr. Fairlamb, the town attorney of Delta, who instructed her to purchase the liquor upon the order, giving her the money to pay for it, the money received from Mrs. Dixon to be returned to her, as was afterwards done; and, if the liquor was purchased at all, it was purchased with Fairlamb's money. So far as appears, the sole object the attorney had in view was to procure a violation of the ordinance, in order that a prosecution might be instituted against the offender, and a penalty recovered from him. In pursuance of her instructions, Mrs. Garland went to the defendant and presented the order. She said he sold her the alcohol, and he said he did not. Whether he did or not, she made complaint that he did, and had him brought before the police magistrate to answer the charge. That officer found him guilty, and adjudged a fine against him of $25. He appealed to the county court, where he was discharged, and the town appeals to us from the judgment of that court.

The evidence leaves it very doubtful whether the defendant sold Mrs. Garland any alcohol. Upon the question whether

he did or not, the court made no finding. It simply held that the town could not recover a penalty for a violation of its ordinance instigated and procured by its officer. It is entirely clear that the liquor, if it was purchased at all, was not purchased for the private use of any person. It was purchased to involve the seller in a violation of the ordinance, in order that the town attorney might be enabled to pursue him for a penalty. It was peculiarly the duty of Mr. Fairlamb, in view of the office which he filled, to uphold the ordinances of the town, and to discountenance their violation. But in this case we find him actively engaged in procuring the violation of an ordinance, even expending his own money for the purpose. So far as we can see, his only motive was to compel the victim to pay his money into the town treasury. It would be contrary to good morals to allow the plan to succeed. Public policy will not permit a municipality to derive profit from unlawful acts which are deliberately instigated and contrived by its officers. See Ford *v.* City of Denver, 10 Colo. App. 500, 51 Pac. 1015. To sustain this prosecution would be, in effect, to say that such officers have a license to inveigle citizens into the commission of offenses, to the end that money may be extorted from them.

Intoxicating Liquors—Violation of Ordinance Instigated by Officer—Whether Penalty Recoverable.

The court rendered judgment for costs against the town, and it is said that this was error, because there is no law authorizing the taxation of costs against the people. But, while the action was in the name of the people, it was brought in behalf of the town; and it was against the town, and not the people, that the costs were adjudged. An action brought by a municipality to recover a penalty for the violation of an ordinance is a civil action. City of Greeley *v.* Hamman, 12 Colo. 94, 20 Pac. 1. In civil actions, costs are chargeable against the losing party. So that in its disposition of the costs in this case the court did not err. The judgment will be affirmed. Affirmed.

Action for Penalty—Liability of City for Costs.

CITY OF HAMILTON
v.
ASHBROOK.

(*Supreme Court of Ohio, April 24, 1900.*)

Streets—Change of Grade—Overflow by Natural Water Course—Liability of Municipality.*—A municipal corporation is not liable for damages caused by such increased flow in a natural water course as results from the improvement of lots and streets within the territory whose waters naturally drain into such water course. Springfield *v.* Spence, 39 Ohio St. 665, followed and approved.

Water Courses—Construction of Levees—Duty and Liability of Municipality.—Although the statutes confer upon municipalities situated upon natural water courses authority to levy taxes to acquire sites and construct such levees as public considerations may require, they do not impose the duty of exercising that authority for the protection of lowlands from overflow by natural water courses, nor to indemnify the owners of such lands on account of injuries resulting from such overflow.

Same—Same.—When a municipality, acting upon a license given to it by the owners of lands along a natural water course which flows by or through it, constructs levees for the purpose of confining its waters, it does not thereby undertake that the levees are sufficient to protect such lands from overflow, nor does it engage to maintain them.

(Syllabus by the Court.)

ERROR by defendant to Butler county circuit court. *Reversed.*

Case Stated.

Mrs. Ashbrook brought suit in the court of common pleas against the city of Hamilton to recover damages which resulted from the overflowing of her lot situated within said city in May, 1893, whereby her vegetables, hotbeds, and a rope walk situated on said lot were injured. The substance of her amended petition is that a drain or sewer had been constructed by the city and used by it as a

*See notes at end of case.

part of its sewer system, the sewer being constructed by the erection of dykes or levees on the surface of the ground about 20 feet apart, thereby creating a channel or water way across the low grounds of the plaintiff and others, for the purpose of conveying the surface water to the Great Miami river, about one-third of a mile distant from her premises. She alleged that surface water from a large portion of the city was collected by its drainage system, and thrown into the channel so constructed, and that the banks of said channel were negligently and insufficiently constructed and maintained, so that they were insufficient to resist the weight of water which might be expected to be, and which upon this occasion was, thrown against them, and that from this the overflow of her ground and the consequent injury occurred. She further alleged that the city had constructed bridges for its streets over its said water way, and that said bridges were so low as to interfere with the flow of water in said channel. In its answer the city admitted that it is a municipal corporation of the grade and class alleged in the amended petition, and that at the date alleged and for several days prior thereto there were heavy rains in and about the city. It also admitted the existence of said water way, which was known as "Crawford's Run," flowing past the premises of the plaintiff, and alleged that upon the day of the injury to the plaintiff's premises the water in the river had, in consequence of said rains, reached an unusual stage, and impeded the flow of the water in the run by the backing up of the waters of the river, by which the breaking of the levee was occasioned. It denied all the allegations of the petition which were not expressly admitted. The reply was a general denial of the allegations of the answer.

There was no important conflict in the evidence introduced upon the trial. The drain referred to is a natural water course known as "Crawford's Run" as the original petition had alleged it to be. It flowed by the lowlands of the plaintiff and others lying near the Miami river, in a winding and somewhat ill-defined course, discharging its waters into the river

about one-third of a mile away. The development of the city had been attended by the establishment of grades, the erection of houses and others buildings, and in the improvement of streets and sidewalks, resulting in a somewhat more rapid flow of water from the area which naturally drained into Crawford's run, but there was no evidence tending to show that the city had ever added to the area of drainage. In July, 1868, the proprietors of the lots and lands in the vicinity executed to the city the following instrument: "Whereas, it is proposed by the city council of the city of Hamilton to straighten, widen, and deepen the sewer or drain leading from the Miami canal westwardly to the Miami river, in the south part of the city of Hamilton, Ohio, and along what is known as 'Crawford's Run,' so that the direction of said sewer or drain shall be as follows, to wit: [Courses and distances omitted.] And whereas, in thus following said direction for said sewer or drain it will be necessary to enter upon and occupy for that purpose certain lots and land owned by the grantors herein, as well as to make the necessary excavations thereon for the construction of said sewer or drain: Therefore, in order to afford to the city of Hamilton all proper facilities for the straightening, widening, and deepening of said sewer or drain between the points named, we, the undersigned owners of real estate along the line of said contemplated improvement, do hereby give, grant, and convey to said city of Hamilton the right of way on the real estate owned by us, respectively, along the line of said sewer or drain, to the end that the same may be straightened so as to run in the direction above described. We also grant to said city of Hamilton the right to make all proper excavations and embankments in order to construct said improvement upon our respective tracts of land along the line of said sewer or drain as above described, said excavations to be in all cases upon the line of said drain or sewer; hereby releasing all claim of damages or compensation on account thereof.

In witness whereof we have hereunto set our hand and seal this 27th day of July, 1868."

This instrument was executed by Mrs. Ashbrook's grantor. Pursuant thereto the city then erected the dykes or levees whose insufficiency is alleged, and did all that it ever did to affect, in any way, the flowage of the water in the stream, with the exception of unimportant and infrequent repairs of the dykes or levees which it then constructed. When the levee in front of Mrs. Ashbrook's lot gave way, heavy rains had fallen, large quantities of water had collected in Crawford's run, and a very high stage had been reached by the water in the river, from which it resulted that the levee became soaked and weakened so that it gave way. It is not entirely clear whether at the precise time when the break occurred the water in the run was still flowing towards the river, or the waters of the river had set the current in the opposite direction. It is, however, undisputed that within a very brief time thereafter the water was flowing rapidly from the river, that the surface of the water in the river was more than seven feet higher than the portion of Mrs. Ashbrook's lot nearest the levee, and that when the water stood upon her lot at its greatest depth its level was substantially that of the water in the river.

The city solicitor requested the court to give the following instructions, which were refused:

"(1) It having been shown by record evidence that at the time of the improvement of Crawford's run by straightening, deepening, and widening the same that plaintiff's grantor, then the owner of the property described in the petition, in writing, agreed to said improvement and released the city from all claims for damages by reason thereof, and there having been no evidence offered to contradict said agreement, I charge you that plaintiff cannot now complain by reason of the defendant's having made said improvement, whether the same is an artificial or natural water way.

"(2) Before you can find for the plaintiff under the evidence

adduced, you must find that, at or before the time of the improvement of Crawford's run by deepening, widening, and straightening the same, and erecting banks, or at some time since said time, and prior to the injury complained of, said city agreed with plaintiff or her grantor and bound itself to maintain said banks; and, unless you find that there was such an agreement, your verdict must be for defendant."

The jury were instructed generally that, if the city used this run as a part of its drainage system, it was bound to use ordinary care in constructing and maintaining its banks. The portion of the charge which regarded most closely the evidence in the case was the following: "If this drain was so located and constructed that, in times of high water in the river, the water backed up the channel of the drain, and thereby increased the volume of water therein, and the pressure against its banks, it was the duty of the city authorities, if the city maintained and used the drain, to take all reasonable precautions to render the banks of sufficient strength to resist such pressure, and retain such increased volume of water." The jury returned a verdict in favor of Mrs. Ashbrook for the injuries shown to have been done to her property. The city's motion for a new trial was overruled, and a judgment was entered upon the verdict. In the circuit court the judgment of the common pleas court was affirmed.

C. R. Hartkoff, *City Sol.*, and *Ed. H. Jones*, for plaintiff in error.

Morey, *Andrews*, *& Morey*, for defendant in error.

SHAUCK, C. J. (after stating the facts). We do not find in the briefs of counsel for Mrs. Ashbrook any claim that the system of drainage adopted by the city enlarged the area which drained into this natural water course. That view of its liability has not appeared in the case since the filing of the amended petition. Nor does it appear to be the view of counsel that the city is liable for the increased flowage of water resulting from the improvement of property within the area of natural drainage. That a mu-

Streets—Change of Grade—Overflow by Natural Water Course—Liability of Municipality.

nicipality is not liable on that account is settled in Springfield *v.* Spence, 39 Ohio St. 665. Nor could it be maintained upon the evidence in this case that the levees were insufficient to confine the water which actually came from the area of natural drainage. The liability of the city is to be determined in view of the fact, which no evidence in the case obscures, that if at the time of this occurrence the site of Hamilton had been a wilderness, the land now owned by Mrs. Ashbrook would have been covered by water to the same depth. There being no evidence to show that the city caused the water to flow upon her land, we have to inquire whether it is liable for permitting it to flow there.

We do not infer from the charge that such a liability was supposed to result from the erection of levees in 1868 upon the execution of the instrument of that date. That instrument was but a license, and what the city did in the construction of the levees was its execution. No consideration passed from the signers of the instrument, nor did it contain terms binding the city to the construction of levees of sufficient strength to exclude backwater from the river, nor to maintain such levees as it might construct. That it was not intended to impose an obligation upon the city is to be inferred from the fact that it did not execute it. What the city then did indicated the extent to which those then in charge of its affairs thought that public money might properly be used for the protection of its streets and of the neighboring lands from inundation. If they had authority to create a future liability in that regard, and thus to forestall the judgment of their successors upon that question, it is quite clear that they did not attempt to exercise it. The liability of the city was not greater after than before the execution of the license of 1868. The trial judge may have been justified in refusing to instruct that the city was not liable except upon an agreement, since there was no evidence of any agreement affecting the subject of the action.

When in the portion of the charge quoted in the statement of the case, and in other portions of it, the trial judge called

Crawford's run a "drain," he invited himself to the commission of error. And in that, and other portions of the charge, the jury was authorized to draw an inference unfavorable to the city if it used the water way. It did not, according to any evidence in the case, use it otherwise than as a means of escape for the surface water which flowed into it from the natural inclination of the ground. Such use by cities of streams which flow through or by them is universal and inevitable. It is inevitable because of the persistent tendency of water to seek a lower level. We look vainly for the foundation of such a liability as is contemplated in the instructions given. A city may be held in damages for failure to perform its contracts, for wrongs which it perpetrates, and for omissions of duties imposed upon it by law. Here was neither contract nor wrong. What imposed duty was omitted? None is called to our attention. To justify this recovery, the omission would necessarily be of a municipal duty imposed upon the city to exercise the power of taxation for the private purpose of giving low-lying lands which are subject to overflow a value equal to that of those more favorably situated. No statute imposes such a duty. The case does not require us to say that no such duty could be imposed. Levees are public works. The authority to acquire sites for them is conferred by section 2232 of the Revised Statutes, and that to levy taxes for their construction by section 2683. The terms of the statutes impose no duty. They are mere grants of authority, which may be exercised or not according to the discretion of the proper municipal authorities, in view of the public considerations by which its exercise might be affected. Since it was not the duty of the city to make any provision to protect these lands from overflow by the waters of the river, it is plain that it is not liable on account of the inadequacy of the provisions which it saw fit to make. The instruction which would most certainly have led to the right verdict does not appear to have been requested. The

Water Courses—Construction of Levees—Duty and Liability of Municipality.

Same—Same.

Notes

jury should have been directed to return a verdict in favor of the city. Judgments of the circuit and common pleas courts reversed.

NOTES.

Liabilities of Municipal Corporations as to Surface-Waters.—There is no substantial difference in the principles applicable between the cases of the liability of individuals to each other and the liability of municipal corporations to individuals for damage by surface-water. Upon this whole question there is a very decided difference of opinion.

The weight of authority is to the effect that there exists no natural servitude in favor of the owner of the superior or higher ground or fields, as to mere surface-water, or such as falls or accumulates by rain or the melting of snow, and that the owner of the inferior or lower estate may lawfully obstruct the natural flow of such water thereon, and in doing so, may turn the same back, upon, or off, on to, or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion. This view is held in the following States:

Connecticut.—Gillett *v.* Johnson, 30 Conn. 180; Wadsworth *v.* Tilletson, 15 Conn. 336; Grant *v.* Allen, 41 Conn. 156; Chadeayne *v.* Robinson, 55 Conn. 345, 3 Am. St. Rep. 55; Adams *v.* Walker, 34 Conn. 466, 91 Am. Dec. 742.

Indiana.—Taylor *v.* Fickas, 64 Ind. 167, 31 Am. Rep. 114; Cairo, etc., R. Co. *v.* Stevens, 73 Ind. 278, 5 Am. & Eng. R. Cas. 58, 38 Am. Rep. 139; Hill *v.* Cincinnati, etc., R. Co., 109 Ind. 511, 29 Am. & Eng. R. Cas. 502; Shelbyville, etc., Turnpike Co. *v.* Green, 99 Ind. 205; Benthall *v.* Seifert, 77 Ind. 302; Davis *v.* Crawfordsville, 119 Ind. 1; Schlecter *v.* Phillipy, 67 Ind. 201.

Kansas.—Atchison, etc., R. Co. *v.* Hammer, 22 Kan. 763, 31 Am. Rep. 216; Gibbs *v.* Williams, 25 Kan. 214, 37 Am. Rep. 241; Kansas City, etc., R. Co. *v.* Riley, 33 Kan. 374, 20 Am. & Eng. R. Cas. 116.

Maine.—Morrison *v.* Bucksport, etc., R. Co., 67 Me. 353; Bangor *v.* Linsil, 51 Me. 521; Greeley *v.* Maine Cent. R. Co., 53 Me. 200; Murphy *v.* Kelley, 68 Me. 521.

Massachusetts.—Cannon *v.* Hargadon, 10 Allen (Mass.) 106, 87 Am. Dec. 625; Keith *v.* Brockton, 136 Mass. 119, 6 Am. & Eng. Corp. Cas. 133; Parks *v.* Newburyport, 10 Gray (Mass.) 28; Rathke *v.* Gardner, 134 Mass. 14, 14 Am. & Eng. R. Cas. 281; Luther *v.* Winnisominett, 9 Cush. 171; Macomber *v.* Godfrey, 108 Mass. 221, 11 Am. Rep. 349; Stanchfield *v.* Newton, 142 Mass. 110; Turner *v.* Inhabitants, etc., 13 Allen 291; Ashley *v.* Wolcott, 11 Cush. 192;

Notes

Flagg *v.* Worcester, 13 Gray 601; Franklin *v.* Fisk, 13 Allen (Mass.) 211, 90 Am. Dec. 194; Bates *v.* Smith, 100 Mass. 181; Dickenson *v.* Worcester, 7 Allen 19; Cassidy *v.* Old Colony R. Co. 141, Mass. 178, 23 Am. & Eng. R. Cas. 85; Curtis *v.* Eastern R. R., 14 Allen 55; Emery *v.* Lowell, 104 Mass. 16; Hawkesworth *v.* Thompson, 98 Mass. 77.

Minnesota.—O'Brien *v.* St. Paul, 25 Minn. 336, 33 Am. Rep. 470; Hogenson *v.* St. Paul, etc., R. Co., 31 Minn. 226, 14 Am. &. Eng. R. Cas. 291; Rowe *v.* St. Paul, etc., R. Co., 41 Minn. 384, 16 Am. St. Rep. 706; Jordan *v.* St. Paul, etc., R. Co., 42 Minn. 172, 41 Am. & Eng. R. Cas. 1; O'Connor *v.* Fond du Lac, etc., R. R., 5 Am. & Eng. R. Cas. 82.

Missouri.—Shane *v.* Kansas City, etc., R. R., 5 Am. & Eng. R. Cas. 64; Laumier *v.* Francis, 23 Mo. 181; Meer *v.* Springfield, 55 Mo. 119; Munkres *v.* Kansas City, etc., R. R., 60 Mo. 433, 70 Mo. 359; Foster *v.* St. Louis, 71 Mo. 157.

New Hampshire.—Swett *v.* Cutts, 50 N. H. 439, 9 Am. Rep. 276; Bassett *v.* Salisbury Mfg. Co., 43 N. H. 573, 82 Am. Dec. 179.

New Jersey.—Field *v.* West Orange, 36 N. J. Eq. 118; Earl *v.* De Hart, 1 Beas. R. 280; Bowesby *v.* Speer, 2 Vroom 351.

New York.—Bellinger *v.* N. Y. Cent. R. R., 23 N. Y. 42; Brown *v.* Bowen, 30 N. Y. 538; Barkley *v.* Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Conhocton Stone R. R. *v.* Buffalo, etc., R. R., 51 N. Y. 573; Cott *v.* Lewiston, 36 N. Y. 217; Curtis *v.* Ayrault, 47 N. Y. 73; Ellis *v.* Duncan, 21 Barb. 230; Gardner *v.* Newburg, 2 Johns Ch. 162; Goodale *v.* Tuttle, 29 N. Y. 459; Gould *v.* Booth, 66 N. Y. 62; Lynch *v.* New York, 76 N. Y. 60; Pixley *v.* Clarke, 35 N. Y. 532; Sleight *v.* Kingston, 18 N. Y. Sup. Ct. 594; Trustees *v.* Youmans, 50 Barb. 316; Woffle *v.* Porter, 61 Barb. 130; Woffle *v.* N. Y. Cent. R. R., 58 Barb. 413; Wilson *v.* New York, 1 Denio 595; Wagoner *v.* Long Island R. Co., 2 Hun (N. Y.) 633.

Pennsylvania.—Martin *v.* Riddle, 26 Pa. St. 415; Kauffman *v.* Griesemer, 26 Pa. St. 408; L. & C. Turnpike Co's App., 80 Pa. St. 425.

Rhode Island.—Wakefield *v.* Newell, 12 R. I. 75; Buffaur *v.* Harris, 5 R. I. 253.

Vermont.—Chatfield *v.* Wilson, 28 Vt. 49; Beard *v.* Murphy, 37 Vt. 104; Davis *v.* Fuller, 12 Vt. 178.

Wisconsin.—Pettigrew *v.* Evansville, 25 Wis. 223; Hoyt *v.* Hudson, 27 Wis. 656; Fryer *v.* Warne, 29 Wis. 511.

And it has been held that a municipal corporation may change and accelerate the natural flow of its surface-water into a natural water course, and, if no more than the natural amount of such water reaches the stream, the municipality will not be liable for damage to

Notes

lower land from the overflow of the natural water course. Davis *v.* Crawfordsville, 119 Ind. 1; Weis *v.* Madison, 75 Ind. 241; Wheeler *v.* Worcester, 10 Allen (Mass.) 603; O'Brien *v.* St. Paul, 18 Minn. 182; Noonan *v.* Albany, 79 N. Y. 470; Seifert *v.* Brooklyn, 101 N. Y. 204.

And in Cumberland *v.* Willison, 50 Md. 138, it was held that a city would not be liable for such an overflow even though it had increased the discharge of surface-water into the stream. But see O'Brien *v.* St. Paul, 18 Minn. 182.

As to the law in other states, see Gilliam *v.* Madison Co. R. R., 49 Ill. 487; Gormley *v.* Sandford, 52 Ill. 160; Toledo, etc., R. R. *v.* Morrison, 71 Ill. 416; St. Louis, etc., R. R. *v.* Capps, 72 Ill. 188; Jacksonville, etc., R. R. *v.* Cox, 91 Ill. 500; Overton *v.* Sawyer, 1 Jones L. R. 308; Porter *v.* Durham, 74 N. Car. 769; Raleigh, etc., R. R. *v.* Wicker, 74 N. Car. 220; Butler *v.* Peck, 16 Ohio St. 343; Tootle *v.* Clifton, 22 Ohio St. 249; Ogburn *v.* O'Connor, 46 California 346; Miner *v.* Wright, 16 La. Ann. 151; Hooper *v.* Wilkinson, 45 La. Ann. 497.

Contrary Doctrine.—In Gormley *v.* Sandford, 52 Ill. 160, the court observes: "In our judgment the reasoning which leads to the rule forbidding the owner of a field to overflow an adjoining field by obstructing a natural water course fed by remote springs, applies with equal force to the obstruction of a natural channel through which the surface-waters, derived from the rain or snow falling upon such field, are wont to flow. What difference does it make in principle whether the water comes directly upon the field from the clouds above, or has fallen upon remote hills and comes thence in a running stream upon the surface, or rises in a spring upon the upper field and flows upon the lower? The cases asserting a different rule for surface-waters and running streams furnish no satisfactory reason for the distinction. . . . The right of the owner of the superior heritage to drainage is based simply upon the principle that nature has ordained such drainage, and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow, and some rule in regard to it must be established where land is held under artificial titles created by human law, there can clearly be no other rule, at once so equitable and so easy of application, as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land." These views are established in some States and have often met with favor. Toledo, etc., R. R. *v.* Morrison, 71 Ill. 416; St. Louis, etc., R. R. *v.* Capps, 72 Ill. 188; Jacksonville, etc., R. R. *v.* Cox, 91 Ill. 500; Ogburn *v.* O'Connor, 46 Cal. 346; Hooper *v.*

Notes

Wilkinson, 45 La. Ann. 497; Miner *v.* Wright, 16 La. Ann. 151; Tootle *v.* Clifton, 22 Ohio St. 247; Overton *v.* Sawyer, 1 Jones (Law) 308; Porter *v.* Durham, 74 N. Car. 769. But see Raleigh, etc., R. R. *v.* Wicker, 74 N. Car. 220; Kauffman *v.* Griesemer, 26 Pa. St. 408; Earl *v.* De Hart, 12 N. J. Eq. 280; Pettigrew *v.* Village of Evansville, 25 Wis. 223; Louisville, etc., R. R. *v.* Hays (Tenn.), 14 Am. & Eng. R. Cas. 284, *note*.

Where Act of Municipality is in the Nature of a Trespass.—Ashley *v.* Port Huron, 35 Mich. 296, contains a careful and interesting opinion by COOLEY, C. J., upon this question. The case was one where water in increased quantities was collected and discharged upon private property, by means of a sewer cut by the city. After a very thorough review of the case, the court remarks: "It is very manifest, from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act, which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it, without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flood must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction." Pumpelly *v.* Green Bay Co., 13 Wall. 66; Arimond *v.* Green Bay, etc., 31 Wis. 316; Eaton *v.* B. C. & M. R. R., 51 N. H. 504; Rowe *v.* Portsmouth, 56 N. H. 291.

There are numerous other cases which maintain the same doctrines. In Inman *v.* Tripp, 11 R. I. 520, the court remarks that "the city of Providence did not have the right to grade its streets so as to collect the water from a wide area, some of it from distant puddles or ponds, and bring it, charged with the filth of the streets, to the margin of the plaintiff's land, and then empty it upon his land and into his cellar and well." See, also, Nevins *v.* Peoria, 41 Ill. 502; Pettigrew *v.* Evansville, 25 Wis. 223; Shawneetown *v.* Mason, 82 Ill. 337; Winn *v.* Rutland, 52 Vt. 481; Elgin *v.* Kimball, 90 Ill. 356; Noonan *v.* Albany, 79 N. Y. 470; Smith *v.* Alexandria, 33 Gratt. (Va.) 208; Gillison *v.* Charlestown, 16 W. Va. 282; Barns *v.* Hannibal, 71 Mo. 449; Manning *v.* Lowell, 130 Mass. 21; Weiss *v.* Madison, 75 Ind. 241.

In Imler *v.* Springfield, 55 Mo. 119, the court held that where a

Notes

municipal corporation, in grading a street which was higher than the adjoining property, failed to keep open a ditch during the progress of the work, whereby the surface-water from the street flowed upon the adjoining improved property, no liability resulted, as the municipality owed no such duty to the abutting proprietors, who were bound to protect themselves. St. Louis *v.* Gurno, 12 Mo. 414; Wilson *v.* Mayor, etc., of N. Y., 1 Denio (N. Y.) 595; Lynch *v.* Mayor, 76 N. Y. 60; Mills *v.* Brooklyn, 32 N. Y. 489; Roll *v.* Augusta, 34 Ga. 326; Grant *v.* Erie, 69 Pa. St. 420; Allentown *v.* Kranier, 73 Pa. St. 406; Fair *v.* Philadelphia, 88 Pa. St. 309; City Council *v.* Gilmer, 26 Ala. 665, 33 Ala. 116; Aurora *v.* Pulfer, 56 Ill. 270; Schattner *v.* Kansas City, 53 Mo. 162.

Perhaps the limit of this doctrine is reached in those cases which seem to hold that grading, etc., done under proper legal authority, may purposely result in such damage, and leave the adjoining owner without remedy. Mootry *v.* Danbury, 45 Conn. 550; Adams *v.* Walker, 34 Conn. 466; Stack *v.* East St. Louis, 85 Ill. 377; Alton *v.* Hope, 68 Ill. 167; Bloomington *v.* Brokaw, 77 Ill. 194; Aurora *v.* Reed, 57 Ill. 21, 11 Am. Rep. 1; Aurora *v.* Gillett, 56 Ill. 132; Nevins *v.* Peoria, 41 Ill. 502; Ellis *v.* Iowa City, 29 Iowa 229; Greeley *v.* Me. Cent. R. R. Co., 53 Me. 200; Gierleg *v.* R. Co., 53 Me. 200; Bangor *v.* Lansel, 51 Me. 521; Turner *v.* Darmouth, 13 Allen (Mass.) 291; Parks *v.* Newburyport, 10 Gray 28; Barry *v.* Lowell, 8 Allen 127; Flagg *v.* Worchester, 13 Gray 601; Gannon *v.* Hargadon, 10 Allen 106; Dickenson *v.* Worcester, 7 Allen 19; Franklin *v.* Fisk, 13 Allen (Mass.) 211; Pennoyer *v.* Saginaw, 8 Mich. 534; O'Brien *v.* St. Paul, 25 Minn. 331; Alden *v.* Minneapolis, 24 Minn. 254; Moran *v.* Cleams, 63 Barb. 185; Gould *v.* Booth, 66 N Y. 62; Young *v.* Leedom, 67 Pa. St. 351; Kensington Com'rs *v.* Wood, 10 Pa. St. 93; Hoyt *v.* Hudson, 27 Wis. 656, 9 Am. Rep. 473; Pettigrew *v.* Evansville, 25 Wis. 223.

But it is well settled that the corporate authorities, in the exercise of their power to construct sewers and drains and to grade and improve streets, have no right intentionally to divert the surface water and to discharge it by artificial means in increased quantities or in new and destructive currents upon the lands of others. In this respect a municipal corporation stands upon the same footing as a private individual, and incurs the same liability. See Town of Thorntown *v.* Fugate (Ind.), 1 Mun. Corp. Cas. 63, and extensive *note*, 66 *et seq.*

Liability of Municipality for Failure to Construct Drains and Sewers.—See Mayor, etc., of City of Chattanooga *v.* Reid (Tenn.), 308, and *note*, 313 *et seq.*

Drains and Waterways—Overflows—Liability of Municipality.—See

generally Willson *v.* Boise City (Idaho), 1 Mun. Corp. Cas. 542, and *notes*, 555 *et seq.*

Change of Street Grade by Municipality—Liability for Damage.—See generally Ehrsam *v.* City of Utica (N. Y.), 11 Mun. Corp. Cas. 70, and extensive *note*, 77 *et seq.*

PEOPLE *ex rel.* BALCOM

v.

MOSHER *et al.*, BOARD OF COM'RS.

(*Court of Appeals of New York, May 1, 1900.*)

Municipal Corporations—Appointment of Officers—Constitutionality of Statute.—The New York civil service statute of 1899 is unconstitutional; as it is not within the power of the state legislature to abrogate the right conferred by the state constitution upon the local authorities of a city to appoint such of its officers as are not directed by the constitution to be elected or otherwise appointed.

APPEAL by relator from Third department appellate division supreme court. *Affirmed.*

Appeal from an order of the appellate division, in the Third department, reversing an order of the special term granting a peremptory writ of *mandamus* commanding the defendants to appoint the relator to the position of superintendent of streets and city property of the city of Binghamton for a probationary term of two months. The charter of that city provides that the mayor shall appoint four commissioners, who shall constitute a board to be known as the "Board of Street Commissioners of the City of Binghamton"; that it shall have the management and control of the street department; and its powers and duties are defined. It then declares that on the second Tuesday in February of every alternate year the board shall appoint a superintentent of streets and city property for the term of two years, who shall receive an annual salary of $1,000, and defines the duties of the superintendent, which are important, and are of great

interest to the welfare and proper management of the streets and property of the city. He is also required to give a bond, to be approved by the mayor, for the faithful discharge of his duties. Sections 1, 2, 3, 4, 5. The position of superintendent became vacant February 1, 1899, by the expiration of the term of the previous incumbent. In the following April the municipal civil service commission certified to the board of street commissioners the names of three persons appearing upon the eligible list prepared by the commission as the result of a competitive examination therefor. Upon the list were the names of Bolles, Balcom, and Seabury. Bolles stood highest, Balcom next, and Seabury last. Balcom and Seabury were both honorably discharged soldiers of the army during the late Civil War, and as such were entitled to preference over Bolles. Rule 14 of the local civil service commission, which was approved by the mayor and by the state civil service commission in 1898, provided that, when any officer having the power of appointment to or employment in any position in Schedule B (the competitive class) so requests, the commission shall certify to him the names, as soon as practicable, of three persons having the highest standing upon the eligible list, and the appointing officer shall thereupon appoint to the vacant position one of the three persons so certified to him, subject to any and all laws of the state of New York in relation to honorably discharged soldiers or marines of the Civil War, giving them preference under the civil service rules. On April 19, 1899, the legislature passed an act in relation to the civil service of the state, which took effect immediately. Chapter 370, Laws 1899. By section 13 it is provided: "Appointments shall be made to or employment shall be given in all positions in the competitive class that are not filled by promotion, reinstatement, transfer or reduction under the provisions of this act and the rules in pursuance thereof, by appointment of those graded highest in open competitive examinations conducted by the state or municipal commission, except as herein otherwise provided." The state civil service rule

relating to this subject is, in effect, a repetition of the statute itself. Rule 8. That the appointment of a superintendent is to be controlled by the statute of 1899, if valid, seems to be conceded by both parties. The special term held that the civil service law of 1899 was constitutional, and that it required the street commissioners to appoint to the office of street superintendent the veteran who stood highest upon the eligible list furnished by the local civil service commissioners. Upon appeal the appellate division held that the act of 1899 was unconstitutional so far as it required the appointment of the person standing highest upon such list, and reversed the judgment of the special term.

S. H. Ordway, for appellant.
A. M. Sperry, for respondents.

MARTIN, J. (after stating the facts). The only controversy upon this appeal relates to the constitutionality of the civil service statute of 1899. The question involved is the power of the legislature to abrogate the right conferred by the state constitution upon the local authorities of a city to appoint such of its officers as are not directed by the constitution to be elected or otherwise appointed. Section 2, art. 10. The office of superintendent of streets and city property of the city of Binghamton falls within that statute, and, if valid, it is controlling as to the appointment of an incumbent of that office. The provisions of the constitution by which its validity is to be tested are section 2 of article 10 and section 9 of article 5. Section 2 provides: "All city * * * officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, * * * or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose,"—while section 9 declares: "Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as prac-

ticable, shall be competitive: provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made."

In interpreting the constitution, it is to be considered as a whole, complete in itself. Force is to be given to every provision contained in it, and each clause explained and qualified by every other. The words used must be presumed to have been employed in their natural and ordinary meaning, and if different portions seem to be in conflict they must be harmonized, if possible, and that construction adopted which will render every provision operative, rather than one which will make some idle or nugatory. Railway Co. *v.* Anderson, 3 Abb. N. C. 434; People *v.* Angle, 109 N. Y. 564, 575, 17 N. E. 413; People *v.* Roberts, 148 N. Y. 360, 367, 42 N. E. 1082, 31 L. R. A. 399; People *v.* Rathbone, 145 N. Y. 434, 440, 40 N. E. 395, 28 L. R. A. 384; Smith *v.* Board of Sup'rs, 148 N. Y. 187, 189, 42 N. E. 592; Cooley, Const. Lim. 58. Therefore these two provisions should be construed together, giving force to both, and to each should be accorded its appropriate place and proper effect, with some office to perform, and at the same time they should be so construed as to operate harmoniously. We find no repugnancy between these sections of the constitution. Section 2 has been a part of the organic law of the state for many years, and obviously it was not intended to be superseded or changed, as no language was employed in the constitution of 1894 to indicate any such purpose. Moreover, the proceedings of the constitutional convention show that it was intended to be continued in force in its existing form. Section 9 was an amendment adopted in 1894. Both being part of the present constitution, the most that can be claimed is that they should be read and construed together. Reading the amendment of 1894 into section 2, it, in effect, provides that all city officers

whose election or appointment is not otherwise provided for by the constitution shall be appointed by such authorities thereof as the legislature shall designate for that purpose, which appointments shall be made according to merit and fitness, to be ascertained by competitive examinations, so far as practicable. When thus read, it becomes manifest that under the constitution the power of appointment still remains in such local authorities as the legislature has designated for that purpose. No alteration in that respect has been made or attempted. The only change effected by the amendment of 1894 is the requirement that the local authorities in making such appointments shall make them "according to merit and fitness," to be ascertained by examinations, competitive or otherwise. The amendment relates only to the qualifications which appointees shall possess to justify their appointment under section 2, and the manner in which they shall be ascertained. Thus the power of appointment is still vested in the local authorities of the various municipalities of the state, and the amendment has wrought no change as to the officers or bodies who are to make such appointments. The result is the same whether these sections are read together or separately. Section 2 in direct terms provides that such appointments shall be made by the local authorities. Section 9 plainly recognizes that method of appointment by providing for appointments in the civil service without any designation, express or implied, of any new or other authority by which they are to be made. All that is provided by that section is that oppointments made by the proper appointing power are to be according to merit and fitness, but it in no way attempts to change or interfere with the authorities who are to make them. These provisions of the constitution show quite conclusively that the appointment of city officers whose election or appointment is not otherwise provided for by the constitution must still be made by such local authorities of the city as the legislature has designated for that purpose. While the legislature is authorized to designate the local authorities who are to appoint,

yet, when they are thus designated their actual power becomes constitutional, and is controlled by that instrument. In this case the local authorities so designated to appoint a superintendent of streets and city property were the board of street commissioners of the city of Binghamton, and hence that board alone had power, under the constitution, to make an appointment to fill that office. Yet the special term, without permitting it to in any way exercise that power, held the statute of 1899 to be valid, and that under it the board had no right of selection or choice between the several candidates certified as eligible to the place, or between the two veterans who were so certified, but that it was absolutely bound to appoint the one veteran graded highest by the civil service commission, and granted a peremptory *mandamus* commanding the board to appoint that person.

If the civil service commissioners have power to certify to the appointing officers only one applicant of several who are eligible, and whom they have, by their own methods, ascertained to be fitted for a particular position, and their decision is final, or if, where more are certified, the one graded highest must be appointed, then the civil service commission becomes and is the actual appointing power. To reach such a result, however, it must be held that the word "appointment," as used in the constitution, is not to be given its usual and ordinary meaning, but may be so limited and restricted as to leave in the local authorities a mere ministerial duty, with no discretion or choice or responsibility in respect to the person to be appointed. Such a construction would completely nullify the provision of the constitution which confers the power of appointing city officers upon the local authorities of the municipality. A fair reading of the constitution leads to no such result. Early in the history of the civil service reform in this country the signification of the word "appointed" was considered in connection with the United States civil service statute. The United States attorney general, in discussing that question, said: "If to appoint is merely to do a formal act (that is, merely to authenticate a selection not

made by the appointing power), then there is no constitutional objection to the designation of officers by a competitive examination, or any other mode of selection which congress may prescribe or authorize. But, if appointment implies an exercise of judgment and will, the officer must be selected according to the judgment and will of the person or body in whom the appointing power is vested by the constitution, and a mode of selection which gives no room for the exercise of that judgment and will is inadmissible. If the president in appointing a marshal, if the senate in appointing its secretary, if a court or head of department in appointing a clerk, must take the individual whom a civil service board adjudge to have proved himself the fittest by the test of a competitive examination, the will and judgment which determine that appointment are not the will and judgment of the president, of the senate, of the court, or of the head of department, but are the will and judgment of the civil service board, and that board is virtually the appointing power." 13 Ops. Attys. Gen. 516. A subsequent report of the United States civil service commission contained the following statement upon this subject: "The appointing power conferred by congress upon the heads of departments, under the strict terms of the constitution, is a power of choice, —a right of selection for appointment from among several. That opportunity of choice is inseparable from the power itself. * * * A choice between four seems to preserve the authority of the appointing power, and to allow a sufficient variety of capacity for answering the needs of the public business. For both these reasons, a requirement that the applicant graded highest be taken would be indefensible." Report 1884. When we examine the report of the civil service commission of this state, we find that it is said: "It is a wise provision that the commission has no power to make appointments or removals, or even to recommend persons for appointment. Any authority of that character would be fatal to its usefulness, and an unwarrantable interference with sound principles of administration. Its sole duty in its sub-

ordinate sphere is to ascertain the fitness or qualifications of applicants for the service. The appointing power of all public officers remains unimpaired, and should so remain. But the field of selection is limited to those who have been ascertained to be qualified." Report 1885. The decisions of this and other courts, state and federal, as to the meaning of the word "appointment," and what constitutes an appointment under the law, are to the effect that the choice of a person to fill an office constitutes the essence of the appointment; that the selection must be the discretionary act of the officer or board clothed with the power of appointment; that, while he or it may listen to the recommendation or advice of others, yet the selection must finally be his or its act, which has never been regarded or held to be ministerial. 19 Am. & Eng. Enc. Law 423; Johnston *v.* Wilson, 2 N. H. 202; Hoke *v.* Field, 10 Bush 144; People *v.* Fitzsimmons, 68 N. Y. 514; Marbury *v.* Madison, 1 Cranch 137, 2 L. Ed. 60; Craig *v.* Norfolk, 1 Mod. 122; People *v.* Murray, 70 N. Y. 521; Taylor *v.* Kercheval (C. C.) 82 Fed. 497, 499; Menges *v.* City of Albany, 56 N. Y. 374; People *v.* Angle, 109 N. Y. 564, 573, 17 N. E. 413. Thus, it is seen that the authorities upon the subject, and the opinions of those who have been connected with the civil service reform from its inception, all agree in the conclusion that the power of selection for a public office is and should be vested alone in the officers or boards authorized to appoint, although it be limited to persons possessing the qualifications required by the civil service statutes and rules, and that at least some power of selection is necessary to constitute an appointment, which should be exercised by the local authorities, independently of the civil service commission. In Rathbone *v.* Wirth, 150 N. Y. 459, 468, 45 N. E. 15, 34 L. R. A. 408, section 2 of article 10 was under consideration by this court, and its purpose and force were there discussed. In delivering an opinion in that case, JUDGE GRAY said: "The legislature is expressly authorized to designate the local authority who shall appoint the local officers, and it is

impliedly prohibited from doing more than that, or from placing limitations upon this power of appointment. * * * 'Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision.' People *v.* Draper, 15 N. Y. 544." In further discussing that section and its purpose, the case of People *v.* McKinney, 52 N. Y. 374, was cited, where JUDGE ANDREWS said: "The obvious purpose of the provision of the constitution which has been quoted (section 2, art. 10) was to secure to the people of the cities, towns, or villages of the state the right to have their local offices administered by officers selected by themselves." He also quotes from the opinion of JUDGE ALLEN in People *v.* Albertson, 55 N. Y. 50, the following language: "The theory of the constitution is that the several counties, cities, towns, and villages are, of right, entitled to choose whom they will have to rule over them, and that this right cannot be taken from them, and the electors and inhabitants disfranchised, by any act of the legislature, or of any or all the departments of the state government combined."

Assuming, then, in the further discussion of this question, that the purpose of this provision of the constitution was to vest in the local authorities designated by the legislature the power of appointment, and to secure to each municipality the right of self-government, we are led to an examination of the statute of 1899 in the light of these constitutional provisions and the decisions under them. As we have already seen, the right of appointment, of necessity, involves the power of selection and the exercise of discretion and judgment. Without that power in no just sense can it be said that the right exists. If the act of 1899 is valid and bears the construction accorded to it by the special term, then the local authorities designated by the legislature to appoint a superintendent of streets and city property are absolutely deprived of any power of selection, but are required to name the person graded highest. In other words, the real power of appointment is transferred from the authorities in which

it is vested by the constitution to the civil service commissioners. Moreover, by section 10 of the act of 1899, if the mayor for any reason fails to appoint municipal civil service commissioners, the right to appoint them is conferred upon the state commission until the expiration of the term of the mayor then in office, and until their successors are appointed and qualify. The state commissioners are also authorized to remove any municipal civil service commissioner for cause. Therefore there may be circumstances under which the selection of all the appointive officers of a city will be controlled by the state civil service commissioners, and thus the people and the local authorities of the municipality be deprived of any voice in the selection of its officers. If it be said that no such condition has arisen in this case, the answer is that the validity of this statute must be determined by the nature, character, and scope of the powers attempted to be conferred, although they may not have been actually exercised. Stuart *v.* Palmer, 74 N. Y. 183; Coxe *v.* State, 144 N. Y. 396, 39 N. E. 400; Gilman *v.* Tucker, 128 N. Y. 190, 28 N. E. 1040, 13 L. R. A. 304; Colon *v.* Lisk, 153 N. Y. 188, 194, 47 N. E. 302. I fancy it would be difficult to imagine a construction of the constitution which would more completely surprise the inhabitants of the various municipalities or political divisions of the state, or that would work greater injury to fair and proper civil service reform, than one which should hold that the principle of local self-government for the cities, villages, and other municipalities of the state has been so far abrogated by the amendment of 1894 that the power of appointment of their local officers may be transferred from the local authorities to a centralized commission of state appointees, and thus the principle of local self-government practically destroyed. Although this court, in effect, held that the statute of 1883, and the rules adopted by the civil service commissioners under it, which required that officers to be appointed should be selected from the highest three on the eligible list, was valid (People *v.* Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L. R. A. 399;

Chittenden *v.* Wurster, 152 N. Y. 345, 358, 46 N. E. 857, 37 L. R. A. 809), still, when the legislature has, by statute, undertaken to deprive the local authorities of all right of selection and appointment, it has exceeded its constitutional power, and the act is clearly in conflict with the provisions of the organic law, and invalid.

While there are other considerations and authorities bearing upon this question, leading to the same result, yet, in view of the careful opinion of the learned appellate division, and the recent decisions of this court relating to the history, purpose, and effect of the civil service statutes and the amendment of the constitution, we deem further discussion of this question quite unnecessary. The order should be affirmed, with costs.

PARKER, C. J., and O'BRIEN and HAIGHT, JJ., concur. BARTLETT and VANN, JJ., not voting. LANDON, J., not sitting.

Order affirmed.

INDEX TO NOTES.

ABUTTING OWNERS.

Liability for injury caused by coal hole, 33.

Liability for injury caused by defect in street, 33.

ACTIONS.

See Ordinances.

Action against municipality for failure to exercise legislative powers, 28.

APPEAL.

Effect of acquittal on appeal, in action for breach of ordinance, 380.

BICYCLES.

See Streets and Sidewalks.

CHANGE OF GRADE.

See Streets and Sidewalks.

CONSTITUTIONAL LAW.

See Local Assessments.

CONTRACTS.

See Water Supply.

Ultra vires contracts, liability on, 28.

CRIMINAL LAW.

See Ordinances.

DAMAGES.

Measure of, for injury to abutting property by change of grade, 69.

DEDICATION.

Duration of user which will create presumption of, 355.

Presumption of, from user, 354.

DIKES.

See Levees.

DRAINS AND SEWERS.

Liability of city for failure to construct, 313.

Local assessments for construction of sewers, 280.

Local assessments for drains, 283.

Pollution of water course, 59.

ELECTIONS.

See Water Supply.

ESTOPPEL.

See Local Assessments.

EXCLUSIVE PRIVILEGES.

See Water Supply.

EXEMPTIONS.

See Local Assessments.

FIRE DEPARTMENTS.

Accidents caused by, 560.

Liability of city for accidents caused by defects in apparatus, 557.

Liability of city for accidents caused while driving engine, 556.

Liability of city for negligence of, 556.

FIRES.

See Fire Departments.

Destruction of property by negligent or willful act of person destroying water supply, 473.

Liability of water company to citizen for destruction of property through failure to furnish adequate water supply, 468.

Whether insufficient water supply is proximate cause of loss by, 473.

FRONTAGE.

See Local Assessments.

HUCKSTERS.
See Markets.

INJUNCTION.
Enjoining illegal assessments, 19.

INTOXICATING LIQUORS.
Power of city to prohibit sale of, 171.
Sale of, as nuisance, 171.

JAIL.
See Nuisances.

LEVEES.
Local assessments for levees and dikes, 285.

LIMITATION OF INDEBTEDNESS.
See Municipal Corporations.

LIVERY STABLES.
See Nuisances.

LOCAL ASSESSMENTS.
Assessment districts, 657.
Benefit must accrue to land, 265.
Benefit must accrue to premises assessed, 264.
Benefit must be present and immediate, 264.
Benefit is basis of assessment, 262.
Compliance with statutory requirements, 27.
Constitutionality, 271.
Assessment exceeding benefit, 273.
Due process of law, 271.
Taking property without compensation, 276.
Uniformity and equality of taxation, 273.
Definition, 258.
Delegation of power to levy, to municipality, 265.
Delegation of power to municipality—construction of statute, 267.
Delegation of power to levy to municipality must be clearly given, 266.

LOCAL ASSESSMENTS.—*Continued.*
Delegation of power to levy to municipality not implied from general grants, 267.
Distinguished from taxation, 260.
Estoppel to deny validity of, 20.
Exemptions from, 137.
Exercise of taxing power, 259.
For What Leviable.
Drains, 283.
General improvements to streets, 278.
Levees and dikes, 285.
Lighting streets, 280.
Miscellaneous purposes, 287.
Opening streets, 277.
Parks and public squares, 286.
Repaving and repairing streets, 279.
Sewer assessments in particular cases, 282.
Sewer construction, 280.
Sewer construction levied against owner of private sewer, 282.
Sewer maintenance, 282.
Sidewalk construction, 280.
Street crossings and crosswalks, 279.
Sweeping and sprinkling streets, 280.
Water pipes, 286.
Frontage Rule.
Validity, 652.
Validity denied, 656.
Injunction against illegal assessment, 19.
Notice.
Change in name of paper, 403.
Estoppel, 405.
Failure to give originally as bar to reassessment, 400.
Failure to publish in Sunday edition, 403.
Hearing as to apportionment sufficient, 400.
Insufficient publication, 404.
Insufficient specifications, 403.
Length, 403.
Mistake as to ownership, 402.
Mode specified by law must be followed, 400.

LOCAL ASSESSMENTS.—*Continued.*
Necessity of, after neglect of property owner to lay sidewalk, 399.
Notice by publication, 402.
Notice is necessary, 396.
Notice prior to reporting of ordinances, 402.
Not in proper newspaper, 404.
Omission of owners' names and description of property, 402.
Progress of work and public law sufficient to charge property owner with notice, 401.
Publication and posting—statutory requirement construed, 403.
Publication of ordinance with failure to publish resolution, 404.
Reference to resolution of intention for details, 402.
Size of type, 403.
Sufficiency of diagram, 402.
Waiver and estoppel generally, 404,
Waiver by petitioning for improvement, 405.
Waiver by voluntary payment, 405.
Waiver of defects by appearance, 404.
Peculiar species of taxation, 260.
Petition as prerequisite to valid assessment, 11.
Power to levy cannot be delegated by municipality where judicial discretion is required, 269.
Power to levy may be delegated as far as ministerial duties, 270.
Power to levy viewed as peculliarly a municipal one, 269.
Public property, 675.
Sprinkling streets, 137.

MUNICIPAL CORPORATIONS.
Liability for failure to exercise legislative powers, 28.
Liability for failure to prohibit bicycle riding on sidewalks, 449.
Liability for torts, 182.
Liability for trespass, 185.
Notice of limitation of city's power to contract indebtedness, 126.
Power to own land beyond city limits, 546.

MUNICIPAL CORPORATIONS.—*Continued.*

MARKETS.
Power of municipality to prohibit hucksters from selling on streets, 349.
Power of municipality to prohibit sales elsewhere, 348.

NOTICE.
See Local Assessments.
Limitation of city's power to contract debt, 126.

NUISANCES.
Abatement—police powers, 552.
Coal hole in sidewalk not nuisance per se, 34.
Liability of city for failure to abate, 551.
Liability of city for maintaining, 455.
Liability of city for negligence in keeping jail, 455.
Livery stables as, 163.
Power of municipality to declare what is, 163.
Sale of intoxicating liquor as, 171.

ORDINANCES.
Application of requisites relating to crimes in proceedings for violation of, 377.
Effect of acquittal on appeal, in action for violation of, 380.
Review of judgment in action for violation of, 378.
Right of jury trial in action for violation of, 380.
Sufficiency of affidavit or complaint in action for violation of, 378.
Whether violations of, are crimes, 379.

PARKS.
Local assessments for parks and public squares, 286.
Power of legislature to compel city to incur indebtedness for, 368.

PETITION.
See Local Assessments.

POLICE POWERS.
See Nuisances.

POLLUTION.
See Drains and Sewers.

PRACTICE.
See Ordinances.

PROXIMATE CAUSE.
See Fires.

PUBLIC PROPERTY.
See Local Assessments.

PUBLIC SQUARES.
See Parks.

REASSESSMENT.
Failure to give notice of original assessment as bar to, 400.

RIPARIAN OWNERS.
Rights of municipality which is, 384.

SEWERS.
See Drains and Sewers.

STATUTES.
Construction of statute delegating power to levy local assessments to municipality, 267.

STREET CROSSINGS.
See Local Assessments.

STREETS AND SIDEWALKS.
Abutting owner's liability for injury caused by coal hole, 33.
Abutting owner's liability for injury caused by defect in, 33.
Care to be exercised by city in keeping safe, 32.

STREETS AND SIDEWALKS *—Continued.*
Change of Grade.
Measure of damages for injury to abutting property, 69.
Coal hole in sidewalk not a nuisance per se, 34.
Injury to frightened horse from unguarded defect in street, 109.
Liability of city for failure to prohibit bicycle riding on streets, 449.
Liability of city for injury resulting from unmanageable horse coming upon unguarded defect in highway, 101.

SPRINKLING STREETS.
See Local Assessments.

SURFACE WATERS.
Liability of city as to, 757.
Municipality liable where its act in emptying is in nature of a trespass, 760.

TAXATION.
See Local Assessments.

TORTS.
Liability of city for, 182.

TRESPASS.
City liable where its act in emptying surface waters is in the nature of a trespass., 760.
Liability of city for, 185.

ULTRA VIRES.
Liability of city for ultra vires acts, 182.
Liability of municipality on ultra vires contracts, 28.

WAIVER.
See Local Assessments.

WATER COMPANIES.
See Water Supply.

WATER COURSES.
See Drains and Sewers.
Diversion of distant water course by municipality which is riparian owner, 384.

WATER PIPES.
Local assessments for, 286.

WATER SUPPLY.
See Fires.
Duration of contract, 431.
Elections to sanction contract for, 431.
Exclusive Privileges.
Power to grant, 432.
What grants confer, 433.

WATER SUPPLY—*Continued.*
Liability of city for failure to furnish adequate supply, 474.
Liability of water company to citizen for destruction of property through failure to furnish adequate supply, 468.
Power of city to contract for, 427.
Right of municipal corporation as riparian owner to divert distant water course, 384.

GENERAL INDEX.

ABATEMENT.

See Nuisances.

ABUTTING OWNERS.

Abutting owners may recover for injury to sidewalk built at his expense.
Parish *v.* Baird *et al.* (N. Y.), 499.

City not liable for injury to property caused by street railway acting within its franchise.
Purinton *v.* Inhabitants of Town of Somerset (Mass.), 509.

Damages not recoverable by abutting owner for injury to property caused by erection of prison by city.
Long *v.* City of Elberton (Ga.), 450.

Measure of damages in action by abutting owner for injury to sidewalk.
Parish *v.* Baird *et al.* (N. Y.), 499.

Rights of abutting owner as to vault under sidewalk.
Parish *v.* Baird *et al.* (N. Y.), 499.

ACTIONS.

See Equity Jurisdiction.

Action to recover penalty for violation of ordinance is civil action.
People *v.* Braisted (Colo.), 747.

Action will not lie against city for death caused by defective sewer.
Hughes *v.* City of Auburn (N. Y.), 35.

Demand as affecting running of statute.
City of Guthrie *v.* T. W. Harvey Lumber Co. (Okla.), 240.

ACTIONS—*Continued.*

Joinder of parties.
Planters' Oil Mill *v.* Monroe W. & L. Co. *et al.* (La.), 459.

Jurisdiction of petition for removal of obstruction from street used by public for thirty years.
Carlisle *et al. v.* Wilson *et al.* (Ga.), 498.

Limitation of actions against cities.
City of Louisville *v.* Seibert (Ky.), 118.

Notice as condition precedent to action against city.
Engstrom *v.* City of Minneapolis (Minn.), 34.

Public property leased to private person not liable to proceeding in rem for collection of local assessment.
City of St. Louis *v.* Brown *et al.* (Mo.), 659.

APPEAL.

Jurisdiction.
Adkins *et al. v.* City of Richmond (Va.), 515.

Reversal on ground that ordinance violates constitutional provision not granted where record fails to show such violation.
City of Topeka *v.* Raynor (Kan.), 238.

Review.
City of Denver *v.* Moewes (Colo.), 712.
City of Guthrie *v.* T. W. Harvey Lumber Co. (Okla.), 240.

Right to.
In re Melon St. (Pa.), 503.

APPORTIONMENT.

See Local Assessments.

BAIL.

See Municipal Courts.

BICYCLES.
Liability of city for failure to prohibit riding of, on sidewalk.
Tarbutton *v.* Town of Tennille (Ga.), 140.

BRIDGES.
See Streets and Sidewalks.

BURDEN OF PROOF.
See Contracts.

CERTIORARI.
See Local Assessments.
Mernaugh *v.* City of Orlando (Fla.), 164.

CHARTERS.
Construction of.
Duncan *v.* City of Lynchburg (Va.), 540.

CIGARETTES.
Ordinances regulating sales of.
Gundling *v.* City of Chicago (U. S.), 531.

CIVIL SERVICE.
See Municipal Officers.

COMMISSIONERS.
See Eminent Domain.

CONSTITUTIONAL LAW.
See Local Assessments.
Action by legislative council of municipality is action by state within meaning of U. S. constitution.
Iron Mountain R. Co. of Memphis *v.* City of Memphis *et al.* (C. C. A.), 677.
A resolution of a council declaring the forfeiture of a contract between a city and a railroad company whereby it had been agreed between them that the company could occupy the streets provided it would not discriminate against the city in regard to interstate commerce is not invalid as an attempt to regulate interstate commerce.

CONSTITUTIONAL LAW— *Continued.*
Iron Mountain R. Co. of Memphis *v.* City of Memphis *et al.* (C. C. A.), 677.
Frontage rule of assessments.
Adams *v.* City of Shelbyville (Ind.), 575.
Michigan constitution prohibits municipal corporations from engaging in works of internal improvement.
Attorney Gen. *v.* Pingree *et al.* (Mich.), 70.
Ordinance as law impairing contract obligations.
Iron Mountain R. Co. of Memphis *v.* City of Memphis (C. C. A.), 677.
Ordinance declaring that places where persons are permitted to resort to drink intoxicating liquors are nuisances, is constitutional.
City of Topeka *v.* Raynor (Kan.), 238.
Ordinance impairing vested rights is void.
Neill *v.* Gates (Mo.), 727.

CONTRACTS.
See Equity Jurisdiction.
Estoppel.
Annulment of contract cannot be delegated by city.
Neill *v.* Gates (Mo.), 727.
Burden of proving contract in excess of charter limitation.
Arbuckle-Ryan Co. *v.* City of Grand Ledge (Mich.), 205.
City not liable on contract for public improvement which was entered into without compliance with the statutory requirements.
Wheeler *v.* City of Poplar Bluff (Mo.), 20.
Contract for public improvements whereby contractor assumes risk of city's failing to comply with statutory requirements as to such contracts is binding on such contractor.
Wheeler *v.* City of Poplar Bluff (Mo.), 20.

CONTRACTS—*Continued.*
Effect of subsequent ordinance on void contract.
Neill *v.* Gates (Mo.), 727.
Failure to file contractor's certificates as affecting city's liability.
Comstock *et al. v.* Incorporated Village of Nelsonville *et al.* (Ohio), 197.
Ordinance as law impairing contract obligations.
Iron Mountain R. Co. of Memphis *v.* City of Memphis (C. C. A.), 677.
Tax bills issued for construction of sewers are not valid where there has been a breach of the contract.
Neill *v.* Gates (Mo.), 727.
Validity of ultra vires contract by municipal officers.
City of Chicago *v.* Williams (Ill.), 110.

CONTRIBUTORY NEGLIGENCE.
Voluntarily incurring danger to save another's life is not contributory negligence per se.
Corbin *v.* City of Philadelphia (Pa.), 484.

COUNCILS.
Action by legislative council of municipality is action by state within meaning of U. S. constitution.
Iron Mountain R. Co. of Memphis *v.* City of Memphis *et al.* (C. C. A.), 677.
Duty as to subdivision of land for local assessment.
Schroder *v.* Overman, Clerk *et al.* (Ohio), 314.
Power of municipality as to vacation of office of councilman.
State *ex rel.* Atty. Gen. *v.* Orr (Ohio), 196.
Quorum.
State *ex rel.* Atty. Gen. *v.* Orr (Ohio), 196.

DAMAGES.
Damages not recoverable for

DAMAGES—*Continued.*
injury to property caused by erection of prison by city.
Long *v.* City of Elberton (Ga.), 450.
Measure of, in action by abutting owner for injury to sidewalk.
Parish *v.* Baird *et al.* (N. Y.), 499.
Measure of, for injury caused by change of grade.
New Haven Steam Sawmill Co. *v.* City of New Haven (Conn.), 65.

DEDICATION.
Effect of judgment in action to recover for damages to property from encroachment of street.
City of Omaha *v.* Croft *et al.* (Neb.), 172.
Estoppel may be invoked against married woman.
Town of Johnson City *v.* Wolfe *et al.* (Tenn.), 349.
Estoppel to revoke.
Davenport *v.* Buffington *et al.* (C. C. A.), 224.
Implied dedication.
Town of Johnson City *v.* Wolfe *et al.* (Tenn.), 349.

DEMAND.
See Actions.

DEMURRER.
Davenport *v.* Buffington *et al.* (C. C. A.), 224.

DISCRIMINATION.
See Ordinances.

DRAINS AND SEWERS.
Action will not lie against city for death caused by defective sewer.
Hughes *v.* City of Auburn (N. Y.), 35.
Injunction to prevent pollution of water course by.
City of Valparaiso *v.* Hagen *et al.* (Ind.), 51.

DRAINS AND SEWERS—*Continued.*

Liability for adoption of defective plan.
City of Dayton *v.* Taylor's Adm'r (Ohio), 144.

Liability of city for failure to build sewer.
Mayor, etc., of Chattanooga *v.* Reid (Tenn.), 308.

Liability of city for injury to health from defective sewer.
Hughes *v.* City of Auburn (N. Y.), 35.

Liability of city for property flooded through its failure to remove obstruction in sewer.
Judd *et al. v.* City of Hartford (Conn.), 46.

ELECTIONS.

Submission of question of water supply to taxpayers.
Edgerton *v.* Goldsboro Water Co. (N. Car.), 439.

EMINENT DOMAIN.

Commissioners.
City of St. Louis *v.* Brown *et al.* (Mo.), 659.

Commissioners may alter their report before it is filed.
City of St. Louis *v.* Brown *et al.* (Mo.), 659.

Compensation for widening street.
City of St. Louis *v.* Brown *et al.* (Mo.), 659.

Pollution of water course as exercise of right of.
City of Valparaiso *v.* Hagen *et al.* (Ind.), 51.

EQUITY JURISDICTION.

Resulting trusts.
Gamewell Fire-Alarm Tel. Co. *v.* City of Laporte (C. C.), 120.

Right to equitable relief.
Gamewell Fire-Alarm Tel. Co. *v.* City of Laporte (C. C.), 121.

Suit in equity will not lie to recover rental value of a system furnished to a city under a void contract.

EQUITY JURISDICTION—*Continued.*

Gamewell Fire-Alarm Tel. Co. *v.* City of Laporte (C. C.), 120.

Suit to restrain diversion of water by city for public uses where city has agreed to compensate.
Sparks Mfg. Co. *v.* Town of Newton (N. J.), 380.

ESTOPPEL.
See Dedication.

Doctrine of estoppel cannot be invoked to validate contract for public improvement entered into by city without complying with statutory requirements.
Wheeler *v.* City of Poplar Bluff (Mo.), 20.

Petitioning for improvement and acquiescing in its construction does not estop owner to maintain action to enjoin collection of excess of assessment over value of land.
Birdseye *et al. v.* Village of Clyde *et al.* (Ohio), 13.

EVIDENCE.

Expert testimony.
Parish *v.* Baird *et al.* (N. Y.), 499.

EXCLUSIVE FRANCHISES.
See Water Supply.

EXEMPTION.
See Taxation.

EXPERT TESTIMONY.
See Evidence.

FEDERAL JURISDICTION.
See Jurisdiction.

FIRE DEPARTMENT.

City not liable for injuries caused by its employees while handling fire apparatus.
Saunders *v.* City of Ft. Madison (Iowa.), 553.

FIRES.
See Water Supply.

FRONTAGE RULE.
See Local Assessments.

HARMLESS ERROR.
City of Denver *v.* Moewes (Colo.), 712.

HIGHWAYS.
Notice of defect.
Gurney *v.* Inhabitants of Rockport (Me.), 217.
Snow drift as defect.
Gurney *v.* Inhabitants of Rockport (Me.), 217.

INDICTMENT.
Necessity of, in action for violation of ordinance.
Finnical *v.* Village of Cadiz (Ohio), 194.

INJUNCTION.
Enjoining suits impairing Federal jurisdiction.
Iron Mountain R. Co. of Memphis *v.* City of Memphis *et al.* (C. C. A.), 677.
Injunction by property owner to prevent collection of assessment under invalid ordinance.
Adams *v.* City of Shelbyville (Ind.), 575.
Pollution of water course by sewer.
City of Valparaiso *v.* Hagen *et al.* (Ind.), 51.
Restraining exercise of lawful authority.
City of Valparaiso *v.* Hagen *et al.* (Ind.), 51.
Restraining ousting of railroad from street.
Iron Mountain R. Co. of Memphis *v.* City of Memphis *et al.* (C. C. A.), 677.
Right of landowner to enjoin collection of excess of assessment over value of land.
Birdseye *et al. v.* Village of Clyde *et al.* (Ohio), 13.
Right to enjoin collection of local assessment.
Schroder *v.* Overman, Clerk, *et al.* (Ohio), 314.
Taxpayers cannot enjoin property owner from moving his house out of town limits.
Town of St. Lawrence *et al. v.* Gross (S. Dak.), 510.

INJUNCTION—*Continued.*
Taxpayer's right to enjoin diversion of public park.
Davenport *v.* Buffington *et al.* (C. C. A.), 224.

INSTRUCTIONS.
City of Denver *v.* Moewes (Colo.), 712.
City of Lincoln *v.* Pirner (Neb.), 233.
Harmless error.
City of Omaha *v.* Croft *et al.* (Neb.), 172.

INTEREST.
See Local Assessments.

INTERSTATE COMMERCE.
A resolution of a council declaring the forfeiture of a contract between a city and a railroad company whereby it had been agreed between them that the company could occupy the streets provided it would not discriminate against the city in regard to interstate commerce is not invalid as an attempt to regulate interstate commerce.
Iron Mountain R. Co. of Memphis *v.* City of Memphis *et al.* (C. C. A.), 677.
Interstate commerce.
Adkins *et al. v.* City of Richmond (Va.), 514.

INTOXICATING LIQUORS.
General welfare clause does not authorize ordinance making it penal to receive in the city limits without paying a tax liquor lawfully purchased elsewhere.
Henderson, Marshal, *v.* Heyward (Ga.), 739.
Local option as affecting power to license sale of.
Mernaugh *v.* City of Orlando (Fla.), 164.
Ordinance declaring that places where persons are permitted to resort to drink intoxicating

INTOXICATING LIQUORS— *Continued.*
liquors are nuisances, is constitutional.
City of Topeka *v.* Raynor (Kan.), 238.
Ordinance prohibiting women from frequenting saloons.
Gastenau *v.* Commonwealth (Ky.), 736.
Penalty for violation of ordinance prohibiting sale of intoxicating liquor not recoverable where officers instigates violation.
People *v.* Braisted (Colo.), 747.
Regulation of traffic.
Mernaugh *v.* City of Orlando (Fla.), 164.

JUDGMENT.
Effect of judgment in action to recover for damages to property from encroachment of street.
City of Omaha *v.* Croft *et al.* (Neb.), 172.
Final judgments.
Hornung *v.* McCarthy *et al.* (Cal.), 251.
Lack of funds does avoid judgment against city.
Judd *et al. v.* City of Hartford (Conn.), 46.

JURISDICTION.
See Appeal.
Equity Jurisdiction.
Enjoining suits impairing Federal jurisdiction.
Iron Mountain R. Co. of Memphis *v.* City of Memphis *et al.* (C. C. A.), 677.
Federal courts.
Gundling *v.* City of Chicago (U. S.), 531.
Jurisdiction of petition for removal of obstruction from street used by public for thirty years.
Carlisle *et al. v.* Wilson *et al.* (Ga.), 498.

LEGISLATURE.
See Local Assessments.

LEVEES.
See Watercourses.

LICENSES.
Discrimination in ordinance providing for.
Fleetwood *v.* Read (Wash.), 336.
Fees.
Fleetwood *v.* Read (Wash.), 336.
Interstate commerce.
Adkins *et al. v.* City of Richmond (Va.), 514.
License tax for selling goods on street may be imposed on one soliciting orders for a firm which pays a license tax in another city.
Brownback *v.* Burgess, etc., of North Wales (Pa.), 526.
Local option as affecting power to grant liquor license.
Mernaugh *v.* City of Orlando (Fla.), 164.
Market fees.
City of New Orleans *v.* Kientz (La.), 341.
Municipal authority to grant.
Fleetwood *v.* Read (Wash.), 336.
Municipality may impose license fee.
Gundling *v.* City of Chicago (U. S.), 531.
Not a property tax.
Fleetwood *v.* Read (Wash.), 336.
Occupation license as interference with interstate commerce.
City of Laurens *v.* Elmore (S. Car.), 59.
Ordinance prohibiting sale of cigarettes without license which is to be granted to such persons as the mayor deems suitable and proper does not violate the Federal Constitution.
Gundling *v.* City of Chicago (U. S.), 531.
Ordinance requiring licensing of all persons selling on streets is valid exercise of police power.
Brownback *v.* Burgess, etc., of North Wales (Pa.), 526.
Power of state to regulate occupations.
Gundling *v.* City of Chicago (U. S.), 531.

LIMITATION OF ACTIONS.
See Actions.

LOCAL ASSESSMENTS.

Application for reassessment after final judgment.
Hornung *v.* McCarthy *et al.* (Cal.), 251.
Apportionment.
City of Louisville *v.* Selvage (Ky.), 330.
Apportionment which is erroneous should be corrected by the court under a prayer for general relief.
City of Louisville *v.* Selvage (Ky.), 330.
Authority of court to correct apportionment.
City of Louisville *v.* Selvage (Ky.), 330.
Certiorari to review validity of.
State *v.* Mayor, etc., of North Plainfield (N. J.), 326.
Constitutionality of assessment for making gas and water connections with mains owned by private corporations.
Gleason *et al. v.* Waukesha county *et al.* (Wis.), 385.
Constitutionality of assessment for watering streets.
Trustees of Phillips Academy *v.* Inhabitants of Andover (Mass.), 128.
Construction of ordinance ordering assessment for watering street.
Trustees of Phillips Academy *v.* Inhabitants of Andover (Mass.), 128.
Construction of statutes authorizing.
Birdseye *et al. v.* Village of Clyde *et al.* (Ohio), 13.
Cost of making gas and water connections may be assessed against property owners.
Gleason *et al. v.* Waukesha County *et al.* (Wis.), 385.
Districts, how formed.
Adams *v.* City of Shelbyville (Ind.), 575.
Duty of council as to subdivision of property for assessment.
Schroder *v.* Overman, Clerk *et al.* (Ohio), 314.
Effect of amendment to "Taylor Law" on city's power to make.
Walsh *v.* Barron, Treas., (Ohio), 1.
Exemption from taxation does not include.
Trustees of Phillips Academy *v.* Inhabitants of Andover (Mass.), 128.
Failure to file contractor's certificates as affecting his right to recover on contract.
Comstock *et al. v.* Incorporated Village of Nelsonville *et al.* (Ohio), 197.
Failure to provide for compensation as defense to.
Hornung *v.* McCarthy *et al.* (Cal.), 251.
Frontage Rule.
Constitutionality.
Adams *v.* City of Shelbyville (Ind.), 575.
Indiana statute as to, construed.
Adams *v.* City of Shelbyville (Ind.), 575.
Injunction by property owner to prevent collection of assessment under invalid ordinance.
Adams *v.* City of Shelbyville (Ind.), 575.
Interest on assessment warrants where apportionment is corrected.
City of Louisville *v.* Selvage (Ky.), 330.
Legislature may delegate to municipal officers adjustment of special benefits.
Adams *v.* City of Shelbyville (Ind.), 575.
Must not exceed special benefits.
Walsh *v.* Barron, Treas., (Ohio), 1.
Notice—sufficiency.
City of Norfolk *v.* Young *et al.* (Va.), 406.
Notice to property owners.
Gleason *et al. v.* Waukesha County *et al.* (Wis.), 385.

LOCAL ASSESSMENTS—*Continued.*

Ordinance providing for improvement must comply with statutory requirements.
Wheeler *v.* City of Poplar Bluff (Mo.), 20.

Ornamental improvements.
Adams *v.* City of Shelbyville (Ind.), 575.

Petition.
Town of Roswell *v.* Dominice (N. Mex.), 8.

Petition for improvement and acquiescing in its construction does not estop owner to maintain action to enjoin collection of excess of assessment over value of land.
Birdseye *et al. v.* Village of Clyde *et al.* (Ohio), 13.

Public property.
City of St. Louis *v.* Brown *et al.* (Mo.), 659.

Public property leased to private person not liable to proceeding in rem for collection of local assessment.
City of St. Louis *v.* Brown *et al.* (Mo.), 659.

Qualifications of commissioners.
State *v.* Mayor, etc., of North Plainfield (N. J.), 326.

Recovery back, after property sold to satisfy assessment.
Rogers *et al. v.* City of St. Paul (Minn.), 186.

Recovery back, where improvement has been abandonded.
Rogers *et al. v.* City of St. Paul (Minn.), 186.

Right of landowner to enjoin collection of excess of assessment over value of land.
Birdseye *et al. v.* Village of Clyde *et al.* (Ohio), 13.

Right of property owners to be heard on question of benefits.
Adams *v.* City of Shelbyville (Ind.), 575.

Right to enjoin.
Schroder *v.* Overman, Clerk, *et al.* (Ohio), 314.

Statute inapplicable to.
Comstock *et al. v.* Incorporated Village of Nelsonville *et al.* (Ohio), 197.

LOCAL ASSESSMENTS—*Continued.*

Statutory requirements.
Gleason *et al. v.* Waukesha County *et al.* (Wis.), 385.

Subdivision of property for.
People *ex rel.* Kochersperger *v.* Cook (Ill.), 304.

Validity.
Gleason *et al. v.* Waukesha County *et al.* (Wis.), 385.
State *v.* Mayor, etc., of North Plainfield (N. J.), 326.

Validity of assessment for conversion of cul-de-sac into thoroughfare.
In re Orkney St. (Pa.), 288.

LOCAL OPTION.

See Intoxicating Liquors.

MARKETS.

License fee for use of stall.
City of New Orleans *v.* Kientz (La.), 341.

Power of city to prohibit sales elsewhere.
City of New Orleans *v.* Kientz (La.), 341.

MUNICIPAL CORPORATIONS.

See Fire Departments.
Negligence.

Action by legislative council of municipality is action by state within meaning of U. S. constitution.
Iron Mountain R. Co. of Memphis *v.* City of Memphis *et al.* (C. C. A.), 677.

City not liable for injury to property caused by street railway acting within its franchise.
Purinton *v.* Inhabitants of Town of Somerset (Mass.), 509.

Control over extension of street-railway wires.
Chicago General St. Ry. Co. *v.* Ellicott *et al.* (C. C.), 212.

Liability for debts of provisional government.
City of Guthrie *v.* T. W. Harvey Lumber Co. (Okla.), 240.

MUNICIPAL CORPORATIONS—*Continued.*

Liability for defense expenses in action to recover from its policeman for wrongful arrest.
City of Chicago *v.* Williams (Ill.), 110.

Liability of municipality for loss by fire through its failure to supply water.
Planters' Oil Mill *v.* Monroe W. & L. Co. *et al.* (La.), 459.

Liability of a city for wrongful removal of officer.
Arnold *v.* Town of Walton (Ky.), 735.

No liability for failure to exercise legislative powers.
Wheeler *v.* City of Poplar Bluff (Mo.), 20.

Ownership of property outside of city limits.
Duncan *v.* City of Lynchburg (Va.), 540.

Power conferred on, by Michigan statute to own and operate street railways is unconstitutional.
Attorney Gen. *v.* Pingree *et al.* (Mich.), 70.

Power to levy tax.
Edgerton *v.* Goldsboro Water Co. (N. Car.), 439.

Rock quarry not indispensable to accomplishment of objects of municipality.
Duncan *v.* City of Lynchburg (Va.), 540.

MUNICIPAL COURTS.

Authority to forfeit bail bond.
Koger *v.* Mayor, etc., of Madison (Ga.), 369.

MUNICIPAL INDEBTEDNESS.

Notice of limitation of, chargeable to person dealing with city.
Gamewell Fire-Alarm Tel. Co. *v.* City of Laporte (C. C.), 120.

MUNICIPAL OFFICERS.

Authority to grant vacations to policemen.
Wood *et al. v.* City of Haverhill *et al.* (Mass.), 357.

MUNICIPAL OFFICERS—*Continued.*

Constitutionality of New York civil service act.
People *ex rel.* Balcom *v.* Mosher *et al.* (N. Y.), 762.

Legislature may delegate to municipal officers adjustment of special benefits.
Adams *v.* City of Shelbyville (Ind.), 575.

Liability of city for trespass of.
City of Omaha *v.* Croft *et al.* (Neb.), 172.

Liability of city for wrongful removal of officer.
Arnold *v.* Town of Walton (Ky.), 735.

Liability of city ratifying ultra vires acts of.
City of Omaha *v.* Croft *et al.* (Neb.), 172.

Liability of village president ordering arrest without warrant.
Tillman *v.* Beard (Mich.), 246.

Persons dealing with, chargeable with notice as to extent of their authority.
Gamewell Fire-Alarm Tel. Co. *v.* City of Laporte (Ind.), 120.

Power to make certificate from official data of predecessor.
Hornung *v.* McCarthy *et al.* (Cal.), 251.

Qualifications of commissioners appointed for local assessments.
State *v.* Mayor, etc., of North Plainfield (N. J.), 326.

Ultra vires contracts by.
City of Chicago *v.* Williams (Ill.), 110.

NEGLIGENCE.

City leaving explosives unguarded not guilty of.
Afflick *v.* Bates, Treas., (R. I.), 222.

Liability of city for negligence of water department employee.
Lynch *v.* City of Springfield (Mass.), 219.

Proximate cause of injury from unguarded explosives.
Afflick *v.* Bates, Treas., (R. I.), 222.

NOTICE.

See Local Assessments.

Construction of statute requiring notice of injury.
City of Lincoln *v.* Pirner (Neb.), 233.

Defect in highway.
Gurney *v.* Inhabitants of Rockport (Me.), 217.

Defective coal hole.
City of Lincoln *v.* Pirner (Neb.), 233.

Notice as condition precedent to action against city.
Engstrom *v.* City of Minneapolis (Minn.), 34.

Notice as to extent of municipal officer's authority is chargeable to person dealing with him.
Gamewell Fire-Alarm Tel. Co. *v.* City of Laporte (C. C.), 120.

Notice of limitation of indebtedness chargeable to one dealing with city.
Gamewell Fire-Alarm Tel. Co. *v.* City of Laporte (C. C.), 120.

Notice necessary to render city liable for injury caused by ice on sidewalk.
Corey *v.* City of Ann Arbor (Mich.), 720.

Sufficiency of notice of injury from defect.
City of Lincoln *v.* Pirner (Neb.), 233.

NUISANCES.

See Constitutional Law.

City liable for maintenance of prison, in such way as to create nuisance.
Long *v.* City of Elberton (Ga.), 450.

City not liable for nuisance caused by rock quarry owned by it beyond city limits.
Duncan *v.* City of Lynchburg (Va.), 540.

Failure to abate, does not render city liable.
Wood *et al.* *v.* City of Hinton (W. Va.), 547.

NUISANCES—*Continued.*

Liability of city for failure to abate.
Mayor, etc., of Chattanooga *v.* Reid (Tenn.), 308.

Ordinance declaring that places where persons are permitted to resort to drink intoxicating liquors are nuisances, is constitutional.
City of Topeka *v.* Raynor (Kan.), 238.

Pleading, in action to recover for injury from.
Duncan *v.* City of Lynchburg (Va.), 540.

Power of city as to declaring.
Town of Crowley *v.* West (La.), 153.

Validity of ordinance discriminating in declaring.
Town of Crowley *v.* West (La.), 153.

ORDINANCES.

See Resolutions.

Action to recover penalty for violation of, is civil action.
People *v.* Braisted (Colo.), 747.

Constitutionality of ordinance prescribing residence limits for prostitutes.
L'Hote, etc., *v.* City of New Orleans (U. S.), 561.

Constitutional law not involved in question whether title embraces more than one subject.
City of Topeka *v.* Raynor (Kan.), 238.

Construction of.
Trustees of Phillips Academy *v.* Inhabitants of Andover (Mass.), 128.

Discrimination.
Town of Crowley *v.* West (La.), 153.

Discrimination in ordinance providing for licenses.
Fleetwood *v.* Read (Wash.), 336.

Effect of subsequent ordinance on void contract.
Neill *v.* Gates (Mo.), 727.

General and special authority to pass.
Mernaugh *v.* City of Orlando (Fla.), 164.

ORDINANCES—*Continued.*
General welfare clause does not authorize an ordinance making it penal to receive in the city limits, without first paying a tax, liquor lawfully purchased elsewhere.
Henderson, Marshal, *v.* Heyward (Ga.), 739.
Liability of one procuring arrest for violation of void ordinance.
Tillman *v.* Beard (Mich.), 246.
Necessity of indictment in action for violation of.
Finnical *v.* Village of Cadiz (Ohio), 194.
Ordinance as law impairing contract obligations.
Iron Mountain R. Co. of Memphis *v.* City of Memphis (C. C. A.), 677.
Ordinance declaring that places where persons are permitted to resort to drink intoxicating liquors are nuisances, is constitutional.
City of Topeka *v.* Raynor (Kan.), 238.
Ordinance impairing vested rights is void.
Neill *v.* Gates (Mo.), 727.
Ordinance prohibiting sale of cigarettes without license which is to be granted to such persons as the mayor deems suitable and proper does not violate the U. S. constitution.
Gundling *v.* City of Chicago (U. S.), 531.
Ordinance providing for public improvement must comply with statutory requirements.
Wheeler *v.* City of Poplar Bluff (Mo.), 20.
Ordinance requiring licensing of all persons selling on streets is valid exercise of police power.
Brownback *v.* Burgess, etc., of North Wales (Pa.), 526.
Penalty for violation of ordinance prohibiting sale of intoxicating liquor not recoverable where municipal officer instigated the violation.
People *v.* Braisted (Colo.), 747.
ORDINANCES—*Continued.*
Prosecution for violation of, is criminal case.
Barnett *v.* City of Atlanta (Ga.), 373.
Statutory requirement as to manner of passage construed.
City of Louisville *v.* Selvage (Ky.), 330.
Validity of ordinance prohibiting women from frequenting saloons.
Gastenau *v.* Commonwealth (Ky.), 736.
Validity of penal ordinance where act is covered by statute.
Kassell *v.* Mayor, etc., of Savannah (Ga.), 148.
Validity of ordinance discriminating in declaring nuisance.
Town of Crowley *v.* West (La.), 153.

PARKS.
Constitutionality of statute limiting height of buildings near parks.
Att'y Gen. *v.* Williams *et al.* (Mass.), 358.
Construction of statute limiting height of buildings near parks.
Att'y Gen. *v.* Williams *et al.* (Mass.), 358.
Estoppel to revoke dedication.
Davenport *v.* Buffington *et al.* (C. C. A.), 224.
Right of taxpayer to enjoin diversion to private uses.
Davenport *v.* Buffington *et al.* (C. C. A.), 224.

PARTIES.
See Actions.

PETITION.
See Local Assessments.

PLEADING.
Action to recover for injury caused by nuisance.
Duncan *v.* City of Lynchburg (Va.), 540.
Sufficiency of petition.
City of Louisville *v.* Selvage (Ky.), 330.

POLICEMEN.
City not liable for torts of.
City of Chicago *v.* Williams (Ill.), 110.
Granting vacations to.
Wood *et al. v.* City of Haverhill *et al.* (Mass.), 357.
Trespass of, authorized by city, renders it liable.
Town of Johnson City *v.* Wolfe *et al.* (Tenn.), 349.

POLLUTION.
See Water Courses.

PRACTICE.
Reversal on ground that ordinance violates constitutional provision not granted where record fails to show such violation.
City of Topeka *v.* Raynor (Kan.), 238.

PRISONS.
City liable for maintaining prison in such way as to create nuisance.
Long *v.* City of Elberton (Ga.), 450.
Damages not recoverable for injury to property caused by erection of prison by city.
Long *v.* City of Elberton (Ga.), 450.

PROSTITUTES.
Constitutionality of ordinance prescribing residence limits for.
L'Hote, etc., *v.* City of New Orleans (U. S.), 561.

PROVISIONAL GOVERNMENTS.
See Municipal Corporations.

PROXIMATE CAUSE.
See Negligence.

PUBLIC IMPROVEMENTS.
See Estoppel.
Local Assessments.
City not liable for contract for, entered into without compliance with statutory requirements.
Wheeler *v.* City of Poplar Bluff (Mo.), 20.

PUBLIC IMPROVEMENTS—*Continued.*

RATIFICATION.
Question for jury.
City of Omaha *v.* Croft *et al.* (Neb.), 172.

REASSESSMENT.
See Local Assessments.

RESOLUTIONS.
A resolution of a council declaring the forfeiture of a contract between a city and a railroad company whereby it had been agreed between them that the company could occupy the streets provided it would not descriminate against the city in regard to interstate commerce is not invalid as an attempt to regulate interstate commerce.
Iron Mountain R. Co. of Memphis *v.* City of Memphis *et al.* (C. C. A.), 677.

REVIEW.
See Appeal.

RIPARIAN OWNERS.
See Water Courses.
No recovery can be had for injury to tide-water flats by change of street grade.
New Haven Steam Sawmill Co. *v.* City of New Haven (Conn.), 65.

SEWERS.
See Drains and Sewers.

STATUTE OF LIMITATIONS.
See Actions.

STATUTES.
Constitutionality of "Barrett Law."
Adams *v.* City of Shelbyville (Ind.), 575.

STATUTES—*Continued.*

Constitutionality of New York civil service act.
People *ex rel.* Balcom *v.* Mosher *et al.* (N. Y.), 762.

Constitutionality of statute limiting height of buildings near parks.
Atty. Gen. *v.* Williams *et al.* (Mass.), 358.

Construction of.
Comstock *et al. v.* Incorporated Village of Nelsonville *et al.* (Ohio), 197.

Construction of "Barrett Law" as to local assessments.
Adams *v.* City of Shelbyville (Ind.), 575.

Construction of statute authorizing local assessments.
Birdseye *et al. v.* Village of Clyde *et al.* (Ohio), 13.

Construction of statute limiting height of buildings near park.
Atty. Gen. *v.* Williams *et al.* (Mass.), 358.

Construction of statute providing for allowance of claims against provisional government.
City of Guthrie *v.* T. W. Harvey Lumber Co. (Okla.), 240.

Construction of statute requiring notice of injury from defect to be given.
City of Lincoln *v.* Pirner (Neb.), 233.

New York statute permitting action for wrongful death caused by neglect of another does not authorize action against city for death caused by defective sewer.
Hughes *v.* City of Auburn (N. Y.), 35.

Titles.
State *v.* Mayor, etc., of North Plainfield (N. J.), 326.

Validity of penal ordinance where act is covered by statute.
Kassell *v.* Mayor, etc., of Savannah (Ga.), 149.

STREET RAILWAYS.

Street railway injuring property while acting within its franchise does not render city liable.
Purinton *v.* Inhabitants of Town of Somerset (Mass.), 509.

Municipal control over extension of wires.
Chicago General St. Ry. Co. *v.* Ellicott *et al.* (C. C.), 212.

Municipal ownership.
Attorney Gen. *v.* Pingree *et al.* (Mich.), 70.

STREETS AND SIDEWALKS.

See Dedication.

Abutting owner may recover for injury to sidewalk built at his expense.
Parish *v.* Baird *et al.* (N. Y.), 499.

Assessment for conversion of cul-de-sac into thoroughfare.
In re Orkney St. (Pa.), 288.

Bicycle ridden on street and injuring pedestrian does not render city liable.
Jones *v.* City of Williamsburg (Va.), 444.

Bridges in annexed territory must be kept in repair by city.
Comm'rs, etc., *v.* Mayor, etc., of Cedartown (Ga.), 723.

Care required as to repairing defects.
City of Denver *v.* Moewes (Colo.), 712.

Change of Grade.

Change of grade causing overflow of natural water course.
City of Hamilton *v.* Ashbrook (Ohio), 750.

Injury to tide water flats not recoverable for.
New Haven Steam Sawmill Co. *v.* City of New Haven (Conn.), 65.

Liability for injury to access for unreasonable length of time.
City of Louisville *v.* Seibert (Ky.), 118.

STREETS AND SIDEWALKS —*Continued.*

Measure of damages.
New Haven Steam Sawmill Co. *v.* City of New Haven (Conn.), 85.

City not required to keep streets safe for unmanageable horses.
Hungerman *v.* City of Wheeling (W. Va.), 92.

Compensation for widening street.
City of St. Louis *v.* Brown *et al.* (Mo.), 659.

Dedication.
City of Omaha *v.* Croft *et al.* (Neb.), 172.

Defect in sidewalk.
Buckley *v.* Kansas City *et al.* (Mo.), 475.

Defect in sidewalk renders city liable though abutter is required to maintain sidewalk.
City of Lincoln *v.* Pirner (Neb.), 233.

Duty to search for defects in.
City of Lincoln *v.* Pirner (Neb.), 233.

Estoppel of city to question validity of vacation of street.
In re Melon St. (Pa.), 503.

Liability of city for death of boy falling in excavation in street while trying to save another boy who had fallen in it is question for jury.
Corbin *v.* City of Philadelphia (Pa.), 484.

Liability of city for defects in.
City of Lincoln *v.* Pirner (Neb.), 233.

Liability of city for failure to prohibit bicycle riding on sidewalk.
Tarbutton *v.* Town of Tennille (Ga.), 140.

Liability of city for injury caused by unmanageable horse backing over unguarded embankment.
Bell *v.* Village of Wayne (Mich.), 294.
Hungerman *v.* City of Wheeling (W. Va.), 92.

STREETS AND SIDEWALKS —*Continued.*

Local assessments for watering streets.
Trustees of Phillips Academy *v.* Inhabitants of Andover (Mass.), 128.

Measure of damages in action by abutting owner for injury to sidewalk.
Parish *v.* Baird *et al.* (N. Y.), 499.

No liability exists against city or property owner for injuries caused by a fall into a properly protected coal chute in sidewalk.
Rushton *et al. v.* City of Allegheny *et al.* (Pa.), 29.

Notice of defective coal hole necessary to render city liable.
City of Lincoln *v.* Pirner (Neb.), 233.

Notice necessary to render city liable for injury caused by ice on sidewalk.
Corey *v.* City of Ann Arbor (Mich.), 720.

Obstruction of street—jurisdiction of petition for removal.
Carlisle *et al. v.* Wilson *et al.* (Ga.), 498.

Ousting railroads from streets—impairment of contract obligation.
Iron Mountain R. Co. of Memphis *v.* City of Memphis (C. C. A.), 677.

Pedestrian crossing street diagonally assumes risk of injury from falling into catch-basin.
City of Dayton *v.* Taylor's Adm'r (Ohio), 144.

Railroads in.
Iron Mountain R. Co. of Memphis *v.* City of Memphis *et al.* (C. C. A.), 677.

Rights of abutting owners as to vault under sidewalk.
Parish *v.* Baird *et al.* (N. Y.), 499.

Widening streets.
City of St. Louis *v.* Brown *et al.* (Mo.), 659.

TAXATION.
See Licenses.
Exemption from, does not include local assessments.
Trustees of Phillips Academy *v.* Inhabitants of Andover (Mass.), 128.
Exemption of educational institutions.
Trustees of Phillips Academy *v.* Inhabitants of Andover (Mass.), 128.
Exemption of gasworks, waterworks and cemetery.
Negley *v.* City of Henderson (Ky.), 539.
License distinguished from.
Fleetwood *v.* Read (Wash.), 336.
Power of city to levy tax.
Edgerton *v.* Goldsboro Water Co. (N. Car.), 439.

TAX BILLS.
See Contracts.

TAXPAYERS.
See Injunction.

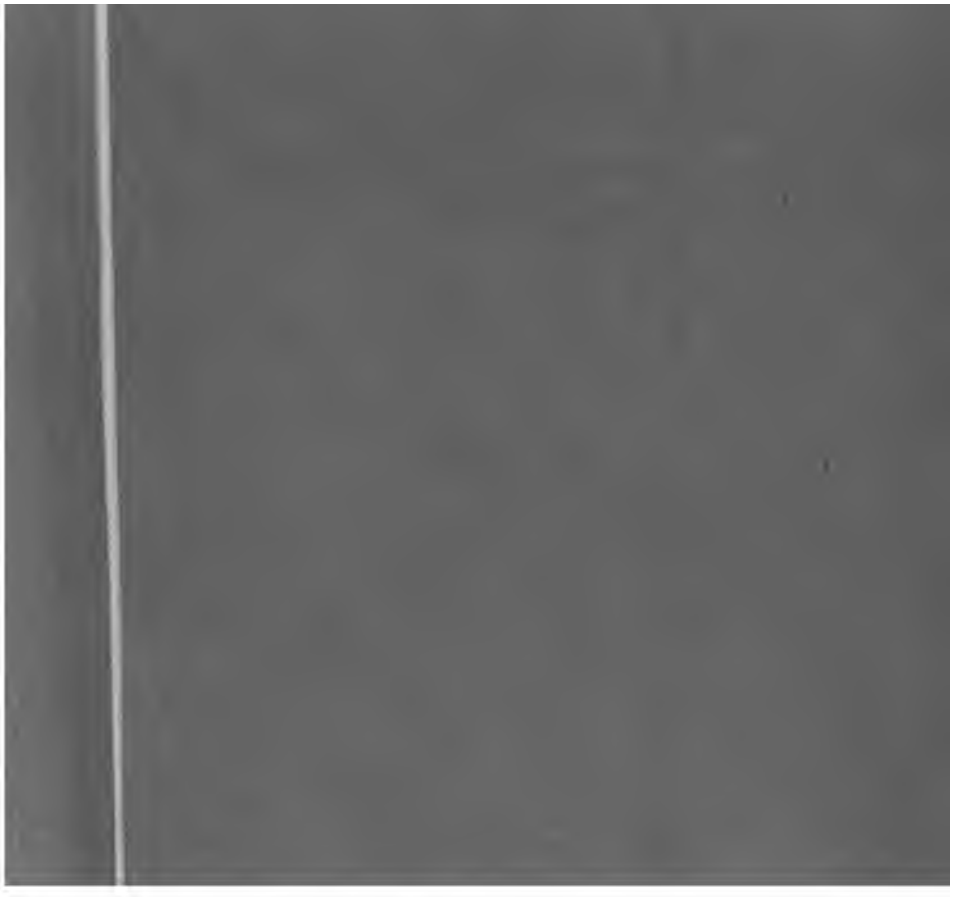
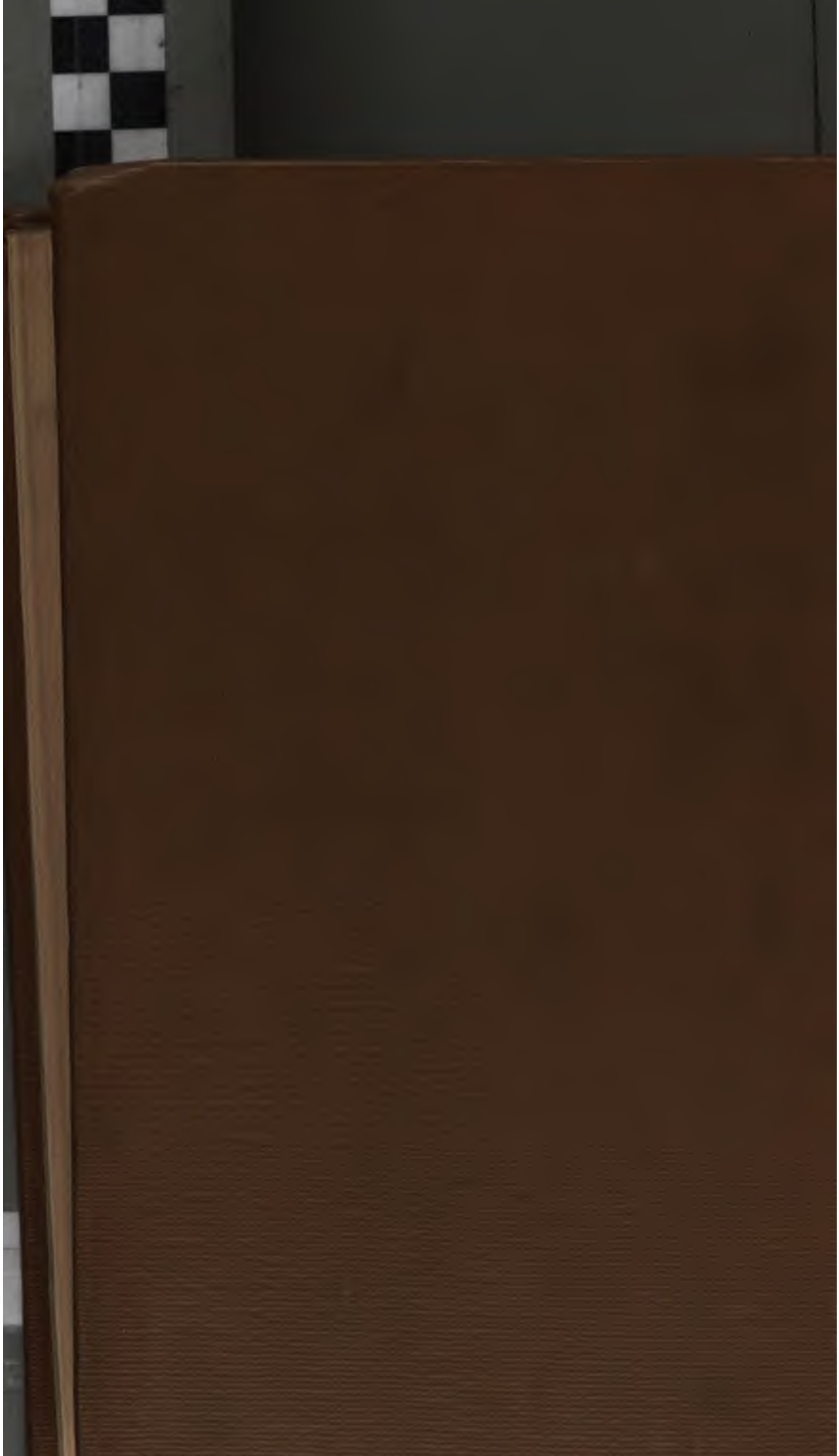
TORTS.
See Policeman.

TRESPASS.
See Municipal Officers.
Policemen.

ULTRA VIRES.
Liability of city ratifying ultra vires acts of officers.
City of Omaha *v.* Croft *et al.* (Neb.), 172.
Validity of ultra vires contracts by municipal officers.
City of Chicago *v.* Williams (Ill.), 110.

WATER COMPANIES.
See Water Supply.

WATER COURSES.
Compensation for diversion of.
Sparks Mfg. Co. *v.* Town of Newton (N. J.), 380.
Diversion of water course by municipal riparian owner.
Sparks Mfg. Co. *v.* Town of Newton (N. J.), 380.
Duty and liability of city as to construction of levees.
City of Hamilton *v.* Ashbrook (Ohio), 750.
Injunction to prevent pollution of by sewage.
City of Valparaiso *v.* Hagen *et al.* (Ind.), 51.
Pollution of, as exercise of right of eminent domain.
City of Valparaiso *v.* Hagen *et al.* (Ind.), 51.

WATER SUPPLY.
Authority of city as to.
North Springs Water Co. *v.* City of Tacoma (Wash.), 410.
Franchise authorizing water company to furnish, not exclusive.
North Springs Water Co. *v.* City of Tacoma (Wash.), 410.
Furnishing of, not a necessary expense of city government.
Edgerton *v.* Goldsboro Water Co. (N. Car.), 439.
Liability of municipality for loss by fire through its failure to supply water.
Planters' Oil Mill *v.* Monroe W. & L. Co. *et al.* (La.), 459.
Liability of water company for loss by fire through its failure to supply water.
Planters' Oil Mill *v.* Monroe W. & L. Co. *et al.* (La.), 459.
Submission of question of, to voters.
Edgerton *v.* Goldsboro Water Co. (N. Car.), 439.

WRONGFUL ARREST.
Liability of village president.
Tillman *v.* Beard (Mich.), 246.